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Editorial Communications should be addressed to—
The Secretary,
The British Year Book of International Law,
The Royal Institute of International Affairs,
Chatham House,
10, St. James's Square, S.W. 1.

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DECISIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE ON POINTS OF LAW AND PROCEDURE OF GENERAL APPLICATION

By W. E. BECKETT, M.A. Formerly Fellow of All Souls College, Oxford.

In the publications of the Permanent Court of International Justice there are at the present moment to be found twenty-three judgments and interlocutory orders, and sixteen advisory opinions. With the obvious exception of the *Lotus* case (Series A, No. 10) and the perhaps less obvious exceptions of the *Irak-Turkish Frontier* case (Series B, No. 12), the *Eastern Carelia* case (Series B, No. 5), the case of the *Tunis and Morocco Nationality Decrees* (Series B, No. 4) and the case of the *Free Zones of Upper Savoy and Gex* (Series A, No. 22), all the cases submitted to the Court have related to the construction of complicated and obscure treaty or contract provisions of apparently no great general interest, and not directly to any question of general international law. For this reason it seems probable that it is not generally realized how many points of general application have already arisen incidentally in the cases submitted to the Court, or how many rulings by the Court on questions of general international law or procedure are to be found embedded in these necessarily long and complicated judgments. The object of the present article is to sift and arrange these rulings and to present in as short a form as possible a survey of those principles of law and practice for which authority can now be found in decisions of the Permanent Court.

The judgments and advisory opinions of the Permanent Court are, apart from general declarations or law-making conventions accepted by states, the most authoritative pronouncements on questions of international law and procedure that can be made while the family of nations remains as at present constituted. In view, moreover, of the rapidly increasing "obligatory jurisdiction" now being conferred upon it by acceptances of the Optional Clause, it seems probable that the Court is likely in the future to play a rôle in the international community no less vitally important than that which the Supreme Court of the United States fills under the Federal Constitution. Consequently it may be of value to have the authority of the Permanent Court for even an elementary and obvious principle, and, in default of a decision on the point, even a dictum may be of some weight.

In presenting this attempted survey, the following divisions and subdivisions of the field are adopted for convenience:

I. *Substantive Law.*
   (1) General principles; nature of international law, &c.
   (2) Particular topics of international law.
   (3) Reparation for breach of an international obligation.
   (4) The Covenant of the League of Nations.

II. *Procedure.*
   (1) Questions of jurisdiction (interpretations of the Statute and Rules of the Permanent Court of International Justice and other instruments conferring jurisdiction on the Court).
   (2) Interpretation and application of the articles of the Statute and of the Rules of the Court, other than those relating to matters of jurisdiction.
   (3) Rules of evidence, &c.

PART I

SUBSTANTIVE LAW

(1) *General Principles.*

The *Lotus* case contains certain dicta relating to the nature of international law which, though in no way novel, will probably be much quoted. The majority of the Court in their judgment say:[1]

> "International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed.
>
> "The first and foremost restriction imposed by international law upon a state is that, failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another state."

In view of the equal division of opinion in the Court in this case, except on the actual narrow ground of the decision (where there was a majority of seven to five) to which further reference will be made below, all other quotations from the opinions delivered in this affair must naturally be treated with some reserve. The following dicta on general points would probably, however, be generally accepted.

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[1] *Publications of the Court*, Series A, No. 10, at p. 18.

Judge Nyholm,[1] dealing with the question as to when a binding rule of international usage can be deduced from the practice of states, says:

> "There must have been acts of state accomplished in the domain of international relations, whilst mere municipal laws are insufficient; moreover the foundation of a custom must be the united *will* of several and even of many states constituting a union of wills or a general consensus of opinion among the countries which have adopted the European system of civilization, or a manifestation of international legal ethics which takes place through the continual recurrence of events with an innate consciousness of their being necessary. These different theories give a general idea of the necessary conditions for the existence of an international law and they show the necessity of some action (acts, will, agreement) on the part of states, without which a rule of international law cannot be based on custom."

Judge Loder[2] seems to be following the same line of thought when he says (discussing the value of provisions in the municipal law of some states assuming a certain jurisdiction and the absence of disputes arising out of them as evidence that the jurisdiction claimed is sanctioned by usage): "International disputes only arise when a particular *application* of the laws in question shows them to be at variance with international law", i.e. it is the exercise of the jurisdiction and acquiescence in it by the other states who are affected, rather than the existence of the law on the statute book, which is evidence of usage.

The Court, in the majority judgment, in fact carries Judge Loder's thought a step farther, for it says that, if a state has in its municipal law two provisions claiming jurisdiction over nationals of foreign states on two separate grounds, and if the jurisdiction claimed on one ground is justified in international law and that claimed on the other is not in conformity with international law, it is immaterial from the point of view of international law that in a given case jurisdiction is in fact exercised on the latter ground, if everything that was done might equally well have been done by proceedings based on the former ground.[3]

Now this opinion is of importance from two points of view: (1) it shows that even the exercise of jurisdiction under a municipal statute based on a doubtful principle is not evidence of usage by acquiescence in cases where another incontestable principle for taking jurisdiction was available; (2) in justifying exercises of jurisdiction by its courts or municipal authorities a state is not bound to justify the actual ground on which they purported to act —it is sufficient if it shows that their actions can be justified on *some* ground.[1]

---

[1] *l.c.*, p. 59.

[2] *l.c.*, p. 34.

[3] *l.c.*, p. 24. "The fact that the judicial authorities may have committed an error in their choice of [*sc.* in failing to select] the legal provision applicable to the particular case and compatible with international law, only concerns municipal law [*sc.* since there was such a provision which they might have selected] and can only affect international law in so far as a treaty provision enters into account or the possibility of a denial of justice arises."

International Law and its relation to individuals.

Applying the general principle that international law only creates rights and duties as between states, the Court, in their advisory opinion relating to the *Danzig Railway Officials*,[2] said the position was the same with regard to agreements between states. Such agreements could not *as such* create direct rights and obligations for private individuals. But it might be that the intention and object of an international agreement was that one of the states should take the necessary steps to create certain rights and obligations for individuals, enforceable in municipal courts, which is a different thing. The Court, then, after holding that this was the effect of the agreement in question and that Poland was bound to do this, said that in the circumstances it was not open to Poland to rely on her own failure to fulfil her obligation to do so as an argument in her favour in the case.[3]

One of the time-honoured theoretical questions as to which publicists have indulged in controversy is the question whether individuals are subjects or only objects of international law. A sturdy minority of writers has stoutly maintained that individuals directly acquired rights under international law, and has quoted in support of its views the redress of their grievances by diplomatic action and international tribunals. The Permanent Court have most clearly expressed their view in the contrary sense and their pronouncements on the position when a state makes a claim against another state in respect of a wrong suffered by its national are illuminating.

---

[1] It was on this last point that Judge Moore, who was with the majority on the principal ground of the decision, tended to differ, thinking that under the terms of the special agreement under which the particular case had been presented to the Court, Turkey had in effect to stand or fall by the form of the actual proceedings which took place. The Court, however (see p. 9 *infra*), based their decision on the ground that the principle of territorial jurisdiction covered the case, and expressed no opinion on the point whether the ground on which the proceedings in the Turkish courts had in fact been based was or was not justifiable in international law.

[2] *Publications of the Court*, Series B, No. 15, at p. 17.

[3] *l. c.*, p. 26.

The second judgment of the Court, which related to the *Mavrommatis Concessions*, contained the first of these pronouncements;[1] but, as it will be necessary to refer to this case again, it will be convenient before quoting it to give an indication of such of the complicated facts of the case as may be necessary for the purpose of appreciating the state of facts to which the quotations made relate.

M. Mavrommatis, a Greek national, obtained in 1914 from the Ottoman Government (or the municipality of Jerusalem) certain concessions with respect to the supply of electric light and other public services in Jerusalem. After the war Great Britain was entrusted with the administration of Palestine under a mandate, and Article 11 of the mandate provided (*inter alia*) that the Administration of Palestine should, subject to any international obligations accepted by the Mandatory, have full power to provide for public ownership or control of public works, services, and utilities. Acting, as the Court held, under the powers granted by this article, the Palestine Administration granted to Mr. Rutenberg a concession which overlapped that obtained by M. Mavrommatis from the Ottoman Government before the war.

A certain protocol, which forms part of the peace settlement with Turkey and is annexed to the Treaty of Lausanne as Protocol XII, provided that concessionary contracts in territories detached from Turkey, entered into before October 29, 1914, between the Ottoman Government (or any local authority) and nationals of contracting Powers other than Turkey (including, therefore, Greece) were to be maintained and adapted to the new conditions.

The case was brought before the Court by the Greek Government on behalf of its national, M. Mavrommatis, and the Greek contention was that M. Mavrommatis had a concession which should have been maintained and adapted under Protocol XII; that by the grant of the concession to Mr. Rutenberg the Palestine Administration had put it outside their power to fulfil this obligation in respect of M. Mavrommatis's concession; that this grant was an exercise by the Palestine Administration of the power given by Article 11 of the mandate in a manner inconsistent with an international obligation of the Mandatory (i.e. Protocol XII), and compensation should, therefore, be paid to M. Mavrommatis; and that since Great Britain disputed all these contentions, there was a dispute between the Mandatory and Greece, a Member of the

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[1] *Publications of the Court,* Series A, No. 2.

League of Nations, relating to the interpretation or the application of the mandate, and under Article 26 of the mandate the Mandatory had agreed to submit such a dispute, if it could not be settled by negotiation, to the Permanent Court. Great Britain, however, also disputed the application of Article 26 of the mandate to the case, and the jurisdiction of the Court thereunder, and the Mavrommatis affair in fact came before the Court on three occasions and forms the subject of three judgments. The first judgment is confined to a decision on the preliminary question whether the Court had jurisdiction under Article 26, and the Court, by a majority of seven to five, held that it possessed jurisdiction. It is from this judgment that the quotations given below are taken. The question was whether (1) there was a dispute between Great Britain and Greece, (2) relating to the interpretation or application of Article 11 of the mandate, (3) which could not be settled by negotiation (Article 26 of the mandate).

With regard to (1) the Court said:[1]

> "The present suit between Great Britain and Greece certainly possesses these characteristics [*sc.* of a dispute between Great Britain and Greece]. The latter Power is asserting its own rights by claiming from H. B. M. Government an indemnity on the ground that M. Mavrommatis, one of its subjects, has been treated by the Palestine or British authorities in a manner incompatible with certain international obligations which they were bound to observe.
>
> "In the case of the Mavrommatis concessions it is true that the dispute was at first between a private person and a state—i.e. between M. Mavrommatis and Great Britain. Subsequently the Greek Government took up the case. The dispute then entered upon a new phase; it entered the domain of international law and became a dispute between two states. . . .
>
> "It is an elementary principle of international law that a state is entitled to protect its subjects when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.
>
> "The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a state has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the state is sole claimant. . . .
>
> "It is true that the state does not substitute itself for its subject; it is asserting its own rights and, consequently, factors foreign to the previous discussions between the individual and the competent authorities may enter into the diplomatic negotiations. . . ."

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[1] *Publications of the Court,* Series A, No. 2, p. 11.

The Court, therefore, makes it clear that, where a state takes up an alleged injury to one of its nationals and a dispute arises:

(i) the parties to the dispute are the two states;
(ii) the claimant state claims for an injury done to itself in the person of its national;
(iii) the claimant state must establish, in order to succeed, a breach of international law.[1]

Though some decisions of earlier arbitral tribunals have so stated the position, the situation has generally, in the case of these tribunals, been complicated by the terms of the treaties from which they derived their jurisdiction, which often used the expression "*claims of subjects of . . .*" and similar phrases, and thus rendered it difficult to say clearly who was the real plaintiff—the national or his state.

In the last of the many judgments of the Court in the dispute between Germany and Poland relating to the *Chorzow Factory*, in which Germany was making a claim for the damage suffered by two German companies through their dispossession from the factory in breach of the terms of the Geneva Convention between Germany and Poland, the Court said[2] (accepting the view of Germany and rejecting that of Poland, who had argued that the case must be decided on the footing of an obligation on the part of Poland to compensate the two companies and not the German state and on the lines of an action of tort in a civil court):

> "Even should it be possible to construe the terms of the application . . . as contemplating compensation due directly to the two companies for damages suffered by them and not reparation due to Germany for a breach of the Geneva Convention . . . the object of the German application can only be to obtain reparation due for a wrong suffered by Germany in her capacity as a Contracting Party to the Geneva Convention. . . .
>
> "Already in Judgment No. 6, establishing the Court's jurisdiction to deal with the alleged violation of the Geneva Convention, the Court recognized that . . . the matter was exclusively a dispute between states. . . . This view of the matter, which is in conformity with the general character of an international tribunal which, in principle, has cognizance only of interstate relations. . . .
>
> "It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured state have suffered as a result of the act which is contrary to international law. . . . The reparation due by one state to another does not, however, change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the

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[1] By special agreement, however, the respondent state may waive this requirement; see p. 34 *infra*. *Serbian Loans Case.*

[2] *Publications of the Court*, Series A, No. 17, p. 26.

measure. The rules of law governing the reparation are the rules of international law in force between the two states concerned, and not the law governing relations between the state which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual, the violation of which rights causes damage, are always in a different plane to rights belonging to a state, which rights may also be infringed by the same act. The damage suffered by an individual is never, therefore, identical in kind with that which will be suffered by a state; it can only afford a convenient scale for the calculation of the reparation due to the state."

Basing itself on the view that Germany was making a claim for an injury to herself, although the injury to Germany was in fact only that inflicted on two German companies, and consequently the compensation awarded for the injury, although it only represented the damage suffered by the companies, was awarded to Germany and was the property of the German state, the Court felt able to lump together the combined damage suffered by the two companies without distinguishing between their respective damages at all.

Judge Nyholm in his dissenting opinion, in a passage[1] which is unfortunately too long to quote, takes the other view—a view which follows more closely that taken by Mixed Claims Tribunals in the past on the basis of the treaties by which[2] they were set up. His view is interesting for the purposes of contrast with that adopted by the Court, for it shows that the Court must have considered it before rejecting it. Judge Nyholm's view is that where a state is only taking up what is in fact a claim of one of its subjects, and is only claiming damages on the basis of what that individual has suffered (and no distinct damage based on something directly affecting the state itself), it may bring such a claim before the Court and must do so in its own name: but it can only do so as a sort of mandatory of the individual and can only receive the compensation awarded in that capacity. The Court, he thought, must take account of this situation and consequently should not lump together the separate damages accruing to two different companies and award the lump sum to Germany to do what she saw fit with it.

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[1] *l. c.*, p. 95.

[2] The Court in this case, indeed, remarked: "International law *does not prevent* one state from granting to another the right to have recourse to international arbitral tribunals in order to obtain the direct award to nationals of the latter state of compensation for damages suffered by them as a result of infractions of international law by the first state."

(2) *Decisions on particular topics of international law.*

Jurisdiction of a state under international law in respect of crimes committed by foreigners.

The decision of the Court in the *Lotus* case[1] has been so much discussed[2] that there is no need to enlarge upon it here. The facts were that a collision occurred on the high seas between a French and Turkish vessel, resulting in the sinking of the latter and the deaths of certain Turkish nationals, and the French navigating officer was tried for manslaughter in the Turkish courts, after being arrested on Turkish territory.

The Court held that the case was covered by the principle of "objective territorial jurisdiction", in other words that a crime may be regarded as being committed at the place where it produces its effects, although the accused was corporally present at the time in another place; and the jurisdiction of a state to punish offences committed by foreigners in its territory extends to offences producing their effects in its territory although the offender was at the time outside such territory.

The principle, as the Court showed by reference to reported decisions, is recognized in the legal systems of most countries, including England and the United States, and only one judge of the minority rejected the principle altogether.

The Court held that the offence of the navigating officer, committed by him when standing on the bridge of the French vessel, might be regarded as being committed on the Turkish vessel, since it produced its effects there, and the case was covered by the principle. For the application of this principle to this state of facts there was a majority of seven to five. Of the judges who dissented, some did so on the ground that the principle only applied in the case of intentional crimes; others on the ground that it did not apply as regards acts of navigation on a vessel by reason of a special rule of customary law reserving this matter to the exclusive jurisdiction of the flag state; others on the ground that ships on the high seas could not be regarded as so closely assimilated to the territory of the state of the flag as to make this principle applicable.

It is, however, important to notice that the case is no authority for the theory that injury to nationals is a valid ground for exercising criminal jurisdiction over foreigners. Six members of the Court expressed views contrary to this theory, and the majority judgment is careful to avoid pronouncing on this point at all, another ground for a decision in Turkey's favour having been found.

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[1] *Publications of the Court*, Series A, No. 10.

[2] See in particular an article by Sir John Fischer Williams in the *Revue Générale de Droit International Public*, 3rd Series, Vol. 11, 1928; an article by Prof. J. L. Brierly in the *Law Quarterly Review*, 1928, Vol. 44, p. 154; a note on this case in the *Year Book* for 1928 at p. 131, and articles in the *Year Book* for 1925, "Criminal Jurisdiction over Foreigners", and for 1927 "The *Franconia* and the *Lotus*" by the present writer.

Jurisdiction over private vessels on the High Seas.

On the view that a pronouncement of the Court, stating even an elementary principle, is worth recording, the following passage from the judgment of the Court in the *Lotus* case may be noted:[1]

> "It is certainly true that, apart from certain special cases which are defined by international law, vessels on the high seas are subject to no authority except that of the state whose flag they fly. In virtue of the principle of freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no state may exercise any kind of jurisdiction over foreign vessels upon them. Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law."

Obligations of a Successor State.

In the Court's opinion in the case of the *German Settlers in Poland*,[2] the following passage occurs:

> "Even those who contest the existence in international law of a general principle of State Succession do not go so far as to maintain that private rights including those acquired from the state as the owner of the property are invalid as against a successor in sovereignty."

The principle of respect for vested rights in International Law.

There are few subjects with regard to which more difference of opinion exists than the question whether, and, if so, to what extent, international law forbids the application of measures conflicting with the principle of respect for vested rights. May a state, for the purposes of putting into operation some new social or economic policy, deprive persons of rights or of property which they enjoy without awarding them adequate compensation? Will it be contravening international law if it applies such measures to foreigners—what it does to its own nationals not being the concern of any other state? If, in principle, such action would not contravene international law, are there any limits beyond which it may not go? If the contrary view is correct, what is the scope of this principle of respect for vested rights, and what, if any, exceptions exist?

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[1] *Publications of the Court*, Series A, No. 10, p. 25.

[2] *Ibid.*, Series B, No. 6, at p. 36.

These are questions which have been hotly debated in connexion for instance with the legislation of the Union of Socialist Soviet Republics, the agrarian legislation of the Baltic States and of the states successors of the former Austro-Hungarian monarchy. The U.S.S.R. totally ignored the principle: the latter awarded some compensation but only a fraction of the value of the rights which were expropriated. In the Year Book[1] three articles have already appeared on this subject, two by Mr. Fachiri, who takes one view, and one by Sir John Fischer Williams who takes another. Since these two learned writers interpret differently the quotation which is given below from a judgment of the Court, it seems prudent merely to give in the present survey the Court's own words on this subject, and to offer no observations as to their meaning.

In the judgment on the merits of the dispute between Germany and Poland concerning certain German interests in Polish Upper Silesia[2] the following passages occur:

> "It should first of all be observed that, whereas Head II [*sc.* of the Geneva Convention between Germany and Poland whose application formed the subject of the dispute] is general in scope and confirms the obligation of Germany and Poland in their respective portions of the Upper Silesian territory to recognize and respect rights of every kind acquired before the transfer of sovereignty, by private individuals. . . . Head III only refers to Polish Upper Silesia and establishes in favour of Poland a right of expropriation which constitutes an exception to the general principle of respect for vested rights. . . . Further there can be no doubt that the expropriation allowed under Head III of the Convention is a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights. As this derogation itself is strictly in the nature of an exception, it is permissible to conclude that no further derogation is allowed. Any measure affecting the property, rights and interests of German subjects covered by Head III of the Convention which is not justified on special grounds taking precedence over the Convention, and which oversteps the limits set by the generally accepted principles of international law, is therefore incompatible with the régime established under the convention. . . . It follows from these same principles that the only measures prohibited are those which generally accepted international law does not sanction in respect of foreigners; expropriation for reasons of public utility, judicial liquidation, and similar measures are not affected by the convention. . . .
>
> (p. 42) "This follows from the principle of respect for vested rights, a

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[1] See *Year Book* for 1925, p. 159; 1928, p. 1; 1929, p. 32.

[2] *Publications of the Court,* Series A, No. 7, at pp. 21–2 and p. 42.

principle which, as the Court has already had occasion to observe, forms part of generally accepted international law, which, as regards this point, amongst others, constitutes the basis of the Geneva Convention."

The question whether treaties can create rights in favour of third parties.

This question arose in the *Upper Silesia* case,[1] where Poland claimed certain rights against Germany under the Armistice Convention of 1918 and the Protocol of Spa of 1920, neither of which instruments had been signed on behalf of Poland. The Court said on this point:

> "In the Court's opinion there has been no subsequent tacit adherence or accession on the part of Poland to the Armistice Convention or Protocol of Spa. It has been argued that this was brought about as a result of the declarations of *de jure* recognition of Poland made by the Allied Powers and by Germany during the peace negotiations or in the Peace Treaty; but the instruments in question make no provision for a right on the part of other states to adhere to them. It is, however, just as impossible to presume the existence of such a right—at all events in the case of an instrument of the nature of the Armistice Convention—as to presume that the provisions of these instruments can *ipso facto* be extended to apply to third states. A treaty only creates law as between the states which are parties to it: *in case of doubt* no rights can be deduced from it in favour of third states."

The Court did not, in this judgment, rule out the possibility that third states might in some circumstances acquire rights under a treaty to which they were not parties; it did not reject the claim on theoretical grounds but said that such a claim required to be clearly established; the presumption was against it. Lord Finlay, in a dissenting judgment, expressed the opinion that this claim was made out in this case as regards the Armistice Convention. He said:[2]

> "It was common knowledge that if the Allies succeeded, the independence of Poland would be one of the terms of peace. All Parties to the Armistice must have contracted with this present to their minds, and it must have been intended that Poland, whose army had been fighting on the side of the Allies as an autonomous army, should be bound by the terms of the Armistice, and, when she came into existence as a recognized state, have the benefit of them. This would be *jus quaesitum*, a right acquired for the new state as soon as it should come into existence. In business, it is a matter of everyday practice, through the machinery of trusts or otherwise, to make contracts on behalf of companies not yet incorporated which take effect upon incorporation, and in my view the Allied states made the Armistice on behalf of Poland, which was about to become a state, as well as on their own behalf."

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[1] *Publications of the Court*, Series A, No. 7, at p. 28.

[2] *l. c.*, p. 84.

In the case of the *Free Zones of Upper Savoy and the District of Gex*[1] the question arose again. The facts of the case are somewhat complicated. This was a dispute between France and Switzerland. The Free Zones are areas inside the French political frontier adjoining the Canton of Geneva, but, under the free zone arrangement, first created in 1815, trade between these zones and Geneva was to be free from French customs duties, so that in effect the French customs frontier did not include these areas of French territory. Article 435 of the Treatyof Versailles contained, *inter alia*, a provision to the effect that the High Contracting Parties agreed that the stipulations of the treaties of 1815 and other supplementary Acts concerning the free zones of Upper Savoy and the Gex district were no longer consistent with present conditions, and that it was for France and Switzerland to come to an agreement together, with a view to settling between themselves the status of these territories. Switzerland was not a party to the Treaty of Versailles, but there is an annex to the article, containing notes exchanged between France and Switzerland, in which Switzerland, on the one hand, declared her acquiescence in Article 435, subject (1) to the reservation that she did not agree to the suppression of these zones or to anything more than some changes in the manner in which the customs system of the zones was regulated; (2) to the condition that the stipulations of the treaties of 1815 should remain in force until a new arrangement was come to between France and Switzerland with regard to these zones; and France, on the other hand, while agreeing to a provisional maintenance of the *status quo*, reserved her rights to adjust her customs to her political frontier.

After some years during which no agreement was come to between France and Switzerland, France moved her customs frontier and included the zones within it, declaring that she had the right to do so by virtue of Article 435; that Switzerland had never acquired any right to the maintenance of these zones since she was not a party to any of the treaties under which they had been created; and that the other parties to those treaties had, by Article 435, released France from her obligation to maintain them.[2]

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[1] *Publications of the Court*, Series A, No. 22.

[2] In fact the Court held that the French contention as to the release under Article 435 was not justified, the Court interpreting it as a release conditional on the assent of Switzerland. As regards the two zones of Upper Savoy also, the Court held that Switzerland had become a party to the agreements (or some of them) under which they had been created while Savoy was still under the sovereignty of Sardinia, but this point is not relevant to the question now being considered.

As regards the zone in the Gex district, Switzerland, on the view taken by the Court of the relevant international agreements, had never become a party to the treaties by which the zone was created. The position was shortly as follows:

There was: (*a*) A declaration of the Congress of Vienna in regard to Switzerland dated March 20, 1815. Switzerland acceded to this declaration by an Act of the Helvetic Confederation of May 27, 1815. This declaration made no mention of the "free zone" of the district of Gex.

(*b*) A Protocol dated November 3, 1815, signed at Paris by the Powers, which did mention the withdrawal of the French customs in the district of Gex.

(*c*) A declaration signed at Paris by the Powers on November 20, 1815, which followed on the Swiss accession to (*a*) and formally transmitted the Protocol (*b*) to Switzerland.

(*d*) Article 1 of the Treaty of Paris of November 20, 1815, which provided in detail for the withdrawal of the French customs and the creation of the Free Zone of Gex.

Switzerland was not represented at the Congress of Vienna nor at the Conference of Paris, nor did she accede to (*b*), (*c*), or (*d*). Neither (*b*) nor (*d*) mentioned Switzerland by name or provided for her accession. The Court held that (*a*), (*b*), (*c*), and (*d*) taken together, and the circumstances in which they were executed, showed an intention on the part of the Powers to create in favour of Switzerland a right to the withdrawal of the French customs from this zone on which Switzerland could rely. The Order of the Court on this point ends with the following paragraph:[1]

> "Whereas the Court, having reached this conclusion simply on the basis of an examination of the situation of fact in regard to this case, need not decide as to the extent to which international law takes cognizance of the principle of 'stipulations in favour of third parties'."

In spite of these cautious words, it seems that the Court's decision as regards the Gex Zone is based upon the recognition of a stipulation in favour of a third party, Switzerland, contained in a treaty between the Powers, as creating a right in Switzerland on which Switzerland could insist and which the Powers, who so created it with the intention of giving Switzerland this right, could not thereafter terminate, without Swiss consent, by agreement between themselves. The Court must have held, therefore, that international law does—in some circumstances—take cognizance of the principle of stipulations in favour of third parties. Indeed in the case of the Gex Zone the Court seems to give the fullest possible effect to the principle.

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[1] *Publications of the Court*, Series A, No. 22, p. 20.

Judge Nyholm dissenting[1] expressed the view that the doctrine of stipulations *in favorem tertii* did not form part of international law, and such stipulations created no right in the third party unless some form of agreement with the third party was added: and the opinion of Deputy Judge Negulesco[2] (Monsieur Dreyfus, French national judge *ad hoc*, expressed a similar opinion)[3] appears to be essentially the same. He held that where the third party was not named in the instrument it was still clearer that the third party acquired no right, but he seemed to think that in some cases a third party might be able to insist on the due performance of the obligation *while it remained in force as between the contracting parties*, although it could be cancelled by the latter without the third party's consent.[4]

Though the Court deliberately (and probably wisely) refrained from making any pronouncement as to the conditions in which a treaty provision may be held to create a right for a third party to insist on its observance, this decision, recognizing that this result can be produced, is of considerable interest. The doctrine of stipulations *in favorem tertii* has never found its way into English law, but this may be only because English law recognizes another method of doing the same thing—a declaration of trust. Lord Finlay, as shown in the passage quoted above, used the analogy of a trust in support of his view with regard to the Armistice Convention in the Upper Silesian case.

Rebus sic stantibus.

In the case of the *Free Zones*, France appears to have supported her contention that she had a right to abolish the zones in spite of the provisions of the treaty of 1815 and the instruments supplementary thereto, on the subsidiary ground that these treaty engagements, like all others, were based upon the conditions existing at the time when they were made and that a vital change in such conditions rendered the engagements no longer applicable. The change in the circumstances invoked by France in this case was that, whereas, at the time these obligations were contracted, the Canton of Geneva had its own customs system separate from the rest of Switzerland, under later constitutional changes in the Confederation one system of customs became applicable to the whole of Switzerland, and consequently the effect of the arrangement with regard to the zones became entirely different, since they were opened not merely (as originally intended) to the trade of the Canton of Geneva, but to that of the whole of Switzerland. The Court rejected this contention on the short ground that in this case there had been a fresh agreement—which must be presumed to be intended to meet this change of circumstances—namely Article 435 of the Treaty of Versailles.

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[1] *l.c.*, pp. 26–7.

[2] *l.c.*, pp. 28–39.

[3] *l.c.*, pp. 42–5.

[4] Though this view is not easy to understand on principle, a Committee of Jurists who reported to the Council of the League of Nations on the Aaland Islands case seem in that case to have based their conclusions on a similar line of reasoning. (*League of Nations Journal*, 1920, p. 18.)

Deputy Judge Negulesco, however, in his dissenting opinion, dealt with this contention from the point of view of general international law,[1] and held that the principle that treaties only apply *rebus sic stantibus* may be invoked as a ground for the extinction of an obligation, but even in cases where the application of the principle is established, there is still no unilateral right to denounce the obligation, but only to have it cancelled under the procedure provided in Article 19 of the Covenant of the League of Nations or by common agreement. M. Dreyfus, French national judge *ad hoc*, would seem to have been of the opinion that, in cases where the principle applied, a party might have the right to denounce the obligation unilaterally.[2]

Neutrality—Use of artificial waterways opened to traffic of all nations.

In the *Wimbledon* case[3] the Court said, with reference to the Kiel Canal:

> "When an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign state under whose jurisdiction the waters in question lie." (Nor does the passage of neutral merchant ships carrying contraband, see p. 25.)

Powers and functions of persons exercising functions of arbitrator between states: how much of a reasoned award is binding?

In its opinion on the *Interpretation of the Greco-Turkish Agreement of December 1, 1928*,[4] the Court said:

> "As a general rule any body possessing jurisdictional powers has the right in the first place to determine the extent of its jurisdiction."

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[1] *Publications of the Court*, Series A, No. 22, pp. 30 and 36.

[2] *l. c.*, pp. 41–2.

[3] *Ibid.*, Series A, No. 1, at p. 28.

[4] *Ibid.*, Series B, No. 16, p. 20.

This power on the part of arbitral bodies has been contested in the past. The British members of the Commission set up under the Jay Treaty—perhaps the first instance of international arbitration in the modern sense—disputed it, but Lord Loughborough, then Lord Chancellor, said their doubts were "absurd".

The cases of the *St. Naoum Monastery*,[1] the *Polish-Czechoslovakian Frontier at Jaworzina*,[2] and the *Polish Postal Services at Danzig*[3] are all authorities to the effect that once an arbitrator (or any one fulfilling functions of that kind) entrusted with the power of giving a decision, has delivered his decision, it is final and the arbitrator is *functus officio* and cannot alter or revoke or even interpret his decision unless he is given some special power to do so by agreement.[4] This principle was in these cases applied by the Court to decisions of the Conference of Ambassadors, of a military Frontier Commission, and of the High Commissioner of Danzig.

The following observations of the Court in the last-mentioned case with regard to the binding effect of the reasons for the decision contained in an arbitral award are of general interest:[5]

> "Now it is certain that the reasons contained in a decision, at least in so far as they go beyond the scope of the operative part, have no binding force as between the Parties concerned. It is perfectly true that all the parts of a judgment concerning the points in dispute explain and complete each other and are to be taken into account in order to determine the precise meaning and scope of the operative portion. This is clearly stated in the award of the Permanent Court of Arbitration of October 14th, 1902, concerning the *Pious Funds of the Californias*. . . . But it by no means follows that every reason given in a decision constitutes a decision; and it must be remembered that the Court of Arbitration applied the doctrine of *res iudicata* because not only the parties but also the matter in dispute was the same."

Questions of Private International Law and Municipal Law.

The two cases of the *Serbian Loans* and the *Brazilian Loans*[6] contain some interesting opinions by the Court with regard to Private International Law and to municipal law. These cases present certain unusual features, some of which are discussed later in Part II of this article.[7] The former case was submitted to the

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[1] *Publications of the Court*, Series B, No. 9.

[2] *Ibid.*, Series B, No. 8.

[3] *Ibid.*, Series B., No. 11, at p. 28.

[4] The Court has under its Statute power to give interpretations of its judgments; see *infra*, p. 47.

[5] *Publications of the Court*, Series B, No. 11, p. 29.

[6] *Ibid.*, Series A, Nos. 20 and 21.

[7] *Infra*, pp. 32–5.

Court by special agreement between France and Jugoslavia and the question related to the currency and rates of exchange applicable to the payment of the capital and interest of certain loans of the Serbian state—largely held by persons of French nationality. The chief point at issue was whether certain provisions in the contracts, in which the expressions "francs" and "gold francs" were used, entitled the bondholders to claim payment at a rate of exchange producing a value equivalent to the amount in question in gold francs or only in French paper francs. The questions related, therefore, to the construction of contracts of loan between a state and individuals, and turned exclusively on points of municipal law, and these questions had never been submitted to any municipal court.

The contracts were made between the Serbian state on the one hand and bondholders of all nationalities on the other, and the bonds were payable in France and a number of other countries. In order to decide, therefore, the question of municipal law thus referred to it, the Court had first to determine a question of Private International Law, namely what municipal law or laws must be applied. The Court prefaced its decision on this point as follows:

> "The rules thereof (*sc.* of Private International Law) may be common to several states, and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between states. *But apart from this, it has to be considered that these rules form part of municipal law.*"[1]

But what rules of Private International Law is the Court to apply? Every municipal court has its own. The Permanent Court has none of its own. Certain remarks of Judge de Bustamante are of interest on this point. Though contained in a dissenting opinion, they state the lines which the majority followed in the judgment of the Court. He says:[2]

> "There is nothing in this task (*sc.* in the determination of the appropriate municipal law) which does not come within the jurisdiction of the Court. In the case of some problems indubitably coming within the sphere of public international law, it often happens that no universal treaty or customary rule has been accepted or followed, and it becomes necessary to choose an international rule that has been followed and enforced by a single state as one of the principles of its municipal law. In other words, and in agreement with the generally accepted practice of Great Britain and the U.S.A., international law frequently forms a

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[1] *Publications of the Court*, Series A, No. 20–21, p. 41. This was the conclusion suggested by the present writer in an article in the *Year Book* for 1926: "What is Private International Law?"

[2] *l.c.*, p. 129.

part of municipal law. We have observed these differences between the municipal laws of different countries last year in a case submitted to the Court and relating to a collision between a French ship and a Turkish ship.

"When we have to endeavour to ascertain and apply a rule of private international law to a question arising between two states that have submitted the dispute to our decision, it may happen that with regard to the point at issue, the Parties have either accepted the same rule of Private International Law, or, on the contrary, divergent rules. If the former is the case, the task of the Court is still more easy and simple."

Coming to the principles to be applied for the purposes of determining the appropriate law or laws, the Court held (expressing principles which are remarkably similar to those expressed in many English judgments):[1] that in determining the question what law governs a contract (between the Serbian state and bondholders of all nationalities under bonds payable in France and other countries) the Court, in accordance with the practice of municipal tribunals, has to take into consideration the actual nature of the obligations, the circumstances of their creation, and the expressed or presumed intention of the parties, but the same law may not govern all the aspects of the obligation, viz. one law may be applicable for the purpose of determining the debt and another for determining the methods of payment, and in a particular country a rule of law founded on considerations of public policy may have to be applied although the contract is one governed by foreign law.

The Court held on the facts that the contract created by these bonds was a contract governed by Serbian law, but that, so far as payment in France was concerned, French law must govern the currency.[2]

Another pronouncement of the Court in this case is one of considerable importance and it is one which will unreservedly commend itself to English lawyers. The English courts themselves when they have to apply a foreign law (as for example in a recent decision by Russell J. (*in re Annesley* [1926], 1 Ch. 692)) adopt the same view. The Permanent Court had to determine a question of French municipal law, which governed the payments in France, namely whether certain French legislative provisions (which appeared to show (i) that in France banknotes had been made legal currency; (ii) that the obligation to exchange them for gold had been abolished; (iii) that every creditor was obliged to accept such banknotes at their face value as due payment for a debt in francs; and (iv) that provisions in contracts making any distinction between these notes and metal currency were rendered null and void) affected the express obligations of the Serbian state under these bonds to pay in gold francs. Decisions of the Cour de Cassation were cited, which held that, although under these provisions a condition in a contract for payment in gold was void when the contract was a domestic transaction, such a condition in an "international" contract was not affected although payment was to be made in France.

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[1] *l.c.*, p. 41.

[2] *l.c.*, p. 44. Judge de Bustamante, in his dissenting judgment at p. 53, comes to the same conclusion (i.e. that French law governs payment) but does so by first distinguishing the cases where the choice of law is governed by the intention, express or implied, of the parties, and those cases where the choice of law is governed by imperative rules based on public policy (*ordre public international*), and then holds that the choice of the law to govern the form, currency, and method of payment of a debt falls into the latter class of case and under an imperative rule by which the law of the place of payment is to be applied (i.e. French law).

The Permanent Court said with reference to these decisions that it would ill accord with the work for which the Court was created and the principles upon which its members are selected, for the Court itself, when it has to decide a question of the municipal law of France, to form its own conclusions regardless of the decisions of the French courts, and to run the risk of giving a decision conflicting with the interpretation—an interpretation, moreover, in which the Court sees nothing unreasonable—of a French statute adopted by the highest French courts. It would be especially dangerous to do so when the question is one of public policy—a conception of which the application in any country at any time depends so largely on the opinions then prevailing there—and when the relevant statutes contain no express provisions dealing in terms with the case in point. It is French legislation *as applied in France* which really constitutes French law, and if that legislation, as so applied, does not prevent the performance of the contract in France in accordance with its express conditions, it is of no significance that the words of such legislation are capable of a different interpretation.

For these reasons the Court held that it must accept the view of French law which the evidence before them showed that the French courts, after some hesitation, had definitely adopted.[1]

In the *Brazilian Loans* case, in which the issues were almost exactly the same, the Court adopted the same line in an even stronger case, for the special agreement provided that the Court should not be bound by the decisions of the municipal courts. The Court interpreted this as meaning that, though it was not bound to follow the municipal decisions, it could do so if it thought that course the only one compatible with the nature and functions of the Permanent Court itself.[1]

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[1] *l.c.*, p. 46. Judges de Bustamante and Pessoa, dissenting, refused to accept the interpretation of French law given by the Cour de Cassation, the latter on the ground that the decisions of the French courts were not sufficiently uniform.

Construction of words "interpretation and application" in arbitration articles.

Though in general the interpretation of an article in a bilateral treaty is not a point of general interest, nevertheless the words "differences arising out of the interpretation and application of" a treaty are of such general use in all treaties of arbitration that a decision as to their meaning is really a point of general interest. In the *Upper Silesian* case between Poland and Germany,[2] the Court said, interpreting these words in the Convention of Geneva between these countries, that the word "and" ("interpretation *and* application") was not to be regarded as having a cumulative, but an alternative, meaning, i.e. it is enough to show that there is a difference relating either to the interpretation or the application of the Convention.

Application of arbitration articles to differences arising before or arising out of events before the date of the arbitration agreement.

In the *Mavrommatis* case[3] the Court expressed the view that, unless an express provision to the contrary is found in an arbitration treaty or article, excluding disputes arising before or out of events previous to the date of the treaty, the agreement must be interpreted as covering all such disputes, and relied on the express exceptions often inserted excluding disputes arising out of events previous to the conclusion of the treaty as showing the necessity of such a limitation being express.

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[1] *Publications of the Court,* Series A, Nos. 20–21, at p. 124. The Court said: "Though bound to apply municipal law when circumstances so require, the Court, which is a tribunal of international law and which, in this capacity, is deemed itself to know what this law is, is not obliged also to know the municipal law of the various countries. All that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied. And this it must do, either by means of evidence furnished by the Parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken.

"Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.

"It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstances apply rules other than those actually applied: this would seem to be contrary to the whole theory on which the application of municipal law is based."

[2] *Ibid.*, No. 6, at p. 14.

[3] *Ibid.*, No. 2, at p. 35.

(3) *Reparation for breach of an international obligation.*

In one of the judgments in the *Chorzow Factory* case[1] the Court said:

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."

In its last judgment relating to the Chorzow Factory[2] the Court had to decide on the measure of damages to be paid by Poland to Germany for a breach of the provisions of the Geneva Convention consisting in the dispossession of two German companies of this factory. Germany, who had originally claimed *restitutio in integrum* of the factory, abandoned (in agreement with Poland) this claim and claimed only a pecuniary indemnity, and the Court said that:[3]

> "Reparation may consist in an indemnity corresponding to the damage which the nationals of the injured state have suffered as a result of the act which is contrary to international law. This is even the most usual form of reparation."

The Court then, dealing with the measure of damages, made the point that Germany on the one hand can only claim for the damage suffered by the two companies on whose injuries her claim is based, and not for damage suffered by other persons. Poland on the other hand could not claim that debts or other obligations for which these companies were responsible should be taken into account for the purpose of diminishing the damages.[4]

The Court then stressed the fact that the injury here was a wrongful dispossession and that the damages payable for such an act were assessed on principles different from those applicable to a lawful expropriation and were not necessarily limited, as in the latter case they would have been, to the value of the undertaking at the time of dispossession, plus interest on that sum to the day of payment: and held that Germany's waiver of the claim to restitution on the ground that the factory was now so altered as to render restitution impracticable, could not alter the principles on which her claim for reparation must be based.

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[1] *Publications of the Court*, Series A, No. 9, p. 21.

[2] *Ibid.*, No. 17.

[3] *l. c.*, p. 27.

[4] *l. c.*, p. 31.

The principles on which an indemnity for a tortious act must be based—which the Court say are established by international practice and the decisions of arbitral tribunals—are that the reparation

> "must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed. Restitution in kind, or, if that is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it."[1]

Following these principles the Court held that the damage payable in this case must be determined by an estimate of what would have been the value of the undertaking at the time of their judgment if no dispossession had taken place, and of the profits that the companies would have made out of it between the time of the dispossession and the time of the judgment, and submitted various questions to experts to ascertain these figures.[2]

These questions submitted to the experts were certainly of rather a hypothetical nature, but it is not possible to say how the Court would have applied the data thus provided, for the case was settled before the experts reported. The Court, however, rejected claims by Germany for damages based on the ground that the German companies, who had also other factories, were prejudiced by the loss of power to influence markets, or by the competition of the Chorzow factory in Polish hands, saying that these claims "would come under the heading of possible but contingent and indeterminate damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account".

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[1] *l. c.*, p. 47. It is to be noticed that the Court (and Lord Finlay in his dissenting judgment, see note below) seem to have no doubt that restitution in kind can be claimed in international law. Some authorities have thought that in this class of case a state could always discharge its duty by a money payment.

[2] Lord Finlay dissented on this point. He held that Germany could either claim restitution or waive restitution and claim damages instead. If Germany waived restitution she could not claim the enhanced value which the property had or would have acquired in the interval, though if she had claimed restitution she would have got the benefit of it. Having elected to take damages the damages must be assessed as at the time of the wrong—namely the value of the enterprise at the date of dispossession, and in addition any other damage directly consequent on the seizure. It was immaterial whether or not the assessment on this basis only produced damages the same as could have been recovered if the act had been a lawful expropriation (see p. 70). He commented unfavourably on the very hypothetical questions submitted to the experts.

Allowance of Interest.

In the *Wimbledon* case[1] the Court awarded interest at six per cent. on the damages awarded in the judgment as from the date of the judgment, "that is to say from the moment when the amount of the sum due has been fixed and the obligation to pay established". The damages resulted from the refusal of Germany to allow a ship to pass through the Kiel Canal, and the heads of damage were demurrage, extra cost of deviation, &c. The applicant states had claimed interest from the date of the refusal to allow the ship to enter the Canal.

The Court refused to award interim interest at a higher rate in the event of the judgment not being complied with at the expiration of the time fixed for payment. The Court declined to contemplate this contingency.

(4) *The Covenant of the League of Nations.*

No decisions of the Permanent Court can be more important than those relating to the interpretation of the Covenant of the League of Nations or the functions of the different organs of the League. There are three pronouncements of the Court in this sphere and they are all of great interest.

Procedure when a question is referred by treaty to the Council for decision. Article 15 *of the Covenant.*

Article 3 (2) of the Treaty of Lausanne provided that

> "the frontier between Turkey and Iraq shall be laid down in friendly arrangement between Turkey and Great Britain within nine months. In the event of no agreement being reached between the two Governments within the time mentioned, the dispute shall be referred to the Council of the League of Nations."

No friendly arrangement as to the frontier was made within the time stipulated, and the question was referred to the Council, but at once differences of opinion arose as to the functions and procedure of the Council under this article, and the following questions were submitted to the Court by the Council in a request for an advisory opinion:

(1) What is the character of the decision to be taken by the Council under Article 3 (2)? Is it an arbitral award, a recommendation, or a simple mediation?

(2) Must the decision be unanimous or may it be taken by a majority?

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[1] *Publications of the Court*, Series A, No. 1, p. 32.

(3) May the representatives of the interested parties take part in the vote?

In delivering an opinion[1] in this case, the Court first of all addressed itself to the interpretation of the treaty, and reached the conclusion that the intention of the treaty was that the Council should give a decision which would finally settle the matter. The Court then held that the reference in Article 3 (2) of the treaty was to the "Council of the League of Nations, that is to say with the organization and functions conferred on it by the Covenant", and not to the persons who happened to be members of the Council.[2] The reference was to the Council, a permanent body with its own organization and rules, contained in the Covenant, and if the Council had any power in this case to follow any procedure or to exercise any powers different from those laid down in the Covenant, such power must be derived from the clearly expressed intention of the parties in the Treaty of Lausanne itself. The powers and procedure of the Council with regard to the settlement of disputes are to be found in Article 15 of the Covenant, and the Court held that the reference to the Council under the treaty was, therefore, reference to the Council acting under, and with the powers it possesses under, Article 15, except in so far as the parties to the treaty clearly intended otherwise. Therefore, the Council must (as the Court held it had already done) provide for the full investigation of the case, receive statements of their case from both parties, and endeavour to effect a settlement in accordance with paragraphs 1, 2, and 3 of Article 15. In the event of a failure to effect a settlement in this way (as was the case in the present affair), Article 15 only gives the Council power to make recommendations (paragraph 4) and provides a prohibition against a resort to war against a party who complies with such recommendations if such recommendations are agreed to unanimously by all the representatives on the Council, other than the representatives of the parties to the dispute (paragraph 6).

Turkey contended that the Council had no power in this case to do more than make recommendations. But the Court held that there was nothing to prevent the parties from conferring by agreement on the Council the power to give a binding decision instead of a recommendation, or the Council from exercising such a power if it were conferred—the powers under Article 15 being only the minimum—and, on the interpretation of the treaty, the Court held that the parties had done so in this case.[3]

[1] *Publications of the Court,* Series B, No. 12.

[2] *l.c.,* p. 29.

[3] *l.c.,* pp. 27 and 28.

The second question was whether the decision could be taken by a majority vote as Great Britain had contended. The Court held that, if the parties had expressly so agreed, the decision could be taken by a majority, but there was in the treaty no such agreement with regard to this matter, though this power had been conferred on the Council in other articles of the treaty relating to other matters. The Council, acting as an organ of the League, cannot be regarded as a tribunal of arbitrators, and consequently it was not possible to argue that the Council should decide by a majority because that was the practice of tribunals of arbitration.[1] Consequently, in this respect the Council must act according to its ordinary rules, and Article 5 of the Covenant provided for unanimity for all decisions with regard to all matters, subject to certain exceptions where a majority vote was allowed (such as in matters of procedure) which did not cover this case, and, therefore, the rule of unanimity applied to the decision to be given in this case.[2]

The last question was whether the representatives of the interested parties could take part in the vote. The Court said that Article 5 did not deal specifically with disputes laid before the Council, but paragraphs 6 and 7 of Article 15 were directed to this particular contingency and those paragraphs made the limited binding effect of recommendations dependent on unanimity, but excluded for this purpose the votes of the interested parties. In the case of disputes, therefore, according to the Covenant the rule of unanimity applies, subject to the limitation that the votes of the representatives of the interested parties do not affect the required unanimity, though these representatives may take part in the voting, and this, the Court held, was the conception of unanimity which must be applied in this case.

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[1] *l.c.*, pp. 26 and 31.

[2] The Court rejected the British argument that the provisions of Article 5 only applied to the exercise of powers conferred on the Council by the Covenant itself, holding that Article 5 always applied except in the cases where express provision to the contrary was made either in the Covenant or in the treaty conferring some additional power on the Council to give decisions, and gave expression to certain weighty views as to the importance of this rule requiring unanimity in the case of decisions by the Council (p. 31): "It is, therefore, composed of representatives of Members, that is to say, of persons delegated by their respective Governments, from whom they receive instructions and whose responsibility they engage.

"In a body constituted in this way, whose mission is to deal with any matter 'within the sphere of action of the League and affecting the peace of the world', observance of the rule of unanimity is naturally and even necessarily indicated. Only if the decisions of the Council have the support of the unanimous consent of the Powers composing it, will they possess the degree of authority which they must have; the very prestige of the League might be imperilled if it were admitted, in the absence of an express provision to that effect, that decisions on important questions could be taken by a majority. Moreover, it is hardly conceivable that resolutions on questions affecting the peace of the world could be adopted against the will of those amongst the members of the Council who, although in a minority, would, by reason of their political position, have to bear the larger share of the responsibilities and consequences ensuing therefrom."

To put it shortly, the opinion of the Court in this case is an authority to the effect that if, in a treaty, two parties refer a matter to the Council of the League of Nations for decision, then, unless there is any specific provision in the treaty to the contrary, it is a reference to the Council as an organ of the League, acting in accordance with its constitution and particularly Article 15 of the Covenant; except that the conclusion of the Council, if unanimously concurred in by all representatives (other than those of the interested parties), is a decision binding on the parties and not merely a recommendation.

Article 15 *of the Covenant, paragraph* 8, *meaning of* "*domestic jurisdiction*".

Paragraph 8 of Article 15 of the Covenant provides that, in the case of a dispute submitted to the Council under Article 15, "if one of the parties claims and the Council finds that the dispute arises out of a matter which *by international law is solely within the domestic jurisdiction of that party*, the Council shall so report and make no recommendation as to its settlement". The advisory opinion of the Court in the case of the *Tunis and Morocco Nationality Decrees*[1] provides a very important decision as to the meaning of the somewhat obscure words in this paragraph printed above in italics.

The case arose in this way. France put into force in her protectorates of Tunis and the French Zone of Morocco certain decrees conferring French nationality on all persons born in those territories of a foreign parent also born there, under which a number of British subjects would have acquired French nationality. Great Britain claimed that the application to British subjects of these decrees was inconsistent with certain treaty rights. Great Britain brought the matter before the Council under Article 15 as a dispute, and France claimed that the matter was one "solely within her domestic jurisdiction": the Council asked the Court for an opinion as to whether the French contention was justified.

The opinion of the Court begins by making it clear that the Court had not to say whether France had or had not the right to apply these decrees to British subjects, but only whether the

[1] *Publications of the Court*, Series B, No. 4.

question of their application to British subjects was "by international law solely within the domestic jurisdiction" of France. Though, from one point of view, it might be said that whatever France had by international law the right to do was solely within her domestic jurisdiction, the Court thought that this was not the meaning of the words in paragraph 8. The words in paragraph 8 meant matters which were not "in principle regulated by international law", although they might closely concern the interests of other states.[1]

The Court then said that, in the present state of international law, questions of nationality were in principle matters solely within the domestic jurisdiction of a state (i.e. in principle the state has the right to frame and to apply its nationality law as it pleases) but a state might have restricted its freedom of action by treaty obligations, in which case, so far as the compatibility of its nationality law with its treaty obligations was concerned, the matter was no longer solely within its domestic jurisdiction, and the dispute became one as to the interpretation of treaty provisions, in respect to which the exception to the Council's power to make recommendations, laid down in paragraph 8, did not apply.[2] But the Court is careful to add that the

> "mere fact that one of the parties appeals to engagements of an international character in order to contest the exclusive jurisdiction of the other is not enough to render paragraph 8 inapplicable. But when once it appears that the legal grounds relied on are such as to justify the provisional conclusion that they are of juridical importance for the dispute submitted to the Council, and that the question whether it is competent for one state to take certain measures is subordinated to the formation of an opinion with regard to the validity of these legal grounds, the provisions contained in paragraph 8 of Article 15 cease to apply and the matter, ceasing to be one solely within the domestic jurisdiction of one state, enters the domain governed by international law."

The Court then goes on to say that on the other hand in order to determine whether a matter is or is not solely within a state's domestic jurisdiction for the purposes of paragraph 8, it is not necessary

> "to give an opinion on the merits of the legal grounds invoked by the parties, this would hardly be in conformity with the system established by the Covenant for the pacific settlement of international disputes."[3]

According to the Court, therefore, in order to determine whether a matter is "solely within a state's domestic jurisdiction" the test is whether the plaintiff state can claim some right, based on a plausible legal case, against the action which is the subject of the dispute.[1] If it can do so, then the case does not come under paragraph 8, and the Council can make recommendations for the settlement of the dispute without deciding which party is in fact legally in the right. The Court applied this test to the case in question, and, finding that France's claim to legislate with regard to nationality in these protectorates with the same freedom as she possessed in France depended on an examination of her whole position as protecting Power, and that she disputed the application of the treaty provisions invoked by Great Britain by relying on the *clausula rebus sic stantibus*, said that it was clear that the question raised in this case was not one solely within her jurisdiction within the meaning of paragraph 8.

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[1] *l.c.*, pp. 22–3. It will be seen later that by these words the Court meant matters with regard to which it is *obvious* that the other party can, under international law, establish no claim as of right (see p. 29 and footnote no. 1).

[2] *l.c.*, p. 26.

[3] *l.c.*, p. 26.

Advisory Opinions—Article 14 *of the Covenant.*

The opinion of the Court in the *Eastern Carelia* affair[2] is of fundamental importance on the whole question of the functions of the Court, when asked for an advisory opinion.

Article 14 of the Covenant says: "The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or the Assembly".[3] The Council asked for the opinion of the Court as to whether certain articles of the Treaty of Dorpat between Finland and the Russian Soviet Government regarding the autonomy of Eastern Carelia constituted engagements placing Russia under an obligation to Finland to carry them out. Russia had strongly objected to the Council of the League of Nations taking action under Article 17 of the Covenant and to the Court dealing with the matter. The Court refused to give an opinion on the following grounds:[4]

"It is well established in international law that no state can, without its consent, be compelled to submit its disputes with other states either to mediation or to arbitration, or to any other kind of pacific settlement. Such consent can be given once and for all in the form of an obligation freely undertaken, but it can, on the contrary, also be given in a special case apart from any existing obligation. The first alternative applies to the Members of the League who, having accepted the Covenant, are under the obligation resulting from the provisions of this pact dealing with the pacific settlement of international disputes. As concerns states not Members of the League, the situation is quite different; they are not bound by the Covenant. The submission, therefore, of a dispute between them and a Member of the League for solution according to the methods provided for in the Covenant, could take place only by virtue of their consent . . . "

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[1] That this is the correct interpretation of this opinion is confirmed by the Court's own statement of the effect of this opinion when referring to it in another case. That statement is to the effect that in Advisory Opinion No. 4 regarding the Nationality Decrees in Tunis and Morocco, the Court, which had to take a decision upon a plea to the jurisdiction (*sc.* of the Council of the League of Nations), declared that the jurisdiction of the Council must be considered to exist, provided that the legal claims of an international character advanced by the parties are such as to justify *the provisional conclusion that they are of juridical importance for the dispute.* (*Mavrommatis* Case, *Publications of the Court*, Series A, No. 2, at p. 16.)

[2] *Publications of the Court*, Series B, No. 5.

[3] *French text:* "Elle donnera aussi des avis consultatifs sur tout différend ou tout point dont la saisira le Conseil ou l'Assemblée."

[4] *l.c.*, pp. 27, 28, 29.

"It appears to the Court that there are other cogent reasons which render it very inexpedient that the Court should attempt to deal with the present question. . . ."

"The Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some enquiry as to facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are.

"The Court is aware of the fact that it is not requested to decide a dispute, but to give an advisory opinion. This circumstance, however, does not essentially modify the above considerations. The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia, and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a court of justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a court."

The Court, therefore, held (1) that it could refuse to give an advisory opinion even if the Council asked for it, (2) that even in giving an advisory opinion it must act as a court and follow the essential rules governing a court's action. In fact the whole procedure adopted by the Court in giving advisory opinions differs little from that followed in cases where the Court is called upon to give a decision, and the result has been to lend much greater weight to such opinions and to allay most of the doubts felt in many quarters with regard to this power to give advisory opinions.

Part II

PROCEDURE

(1) *Questions of Jurisdiction.*

Article 36 of the Statute of the Court provides that: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force." Then follows what is generally described as the "optional clause"—namely the faculty given to states to make a declaration conferring on the Court "compulsory jurisdiction *ipso facto* and without special agreement" with regard to certain classes of legal disputes to which the state making the declaration is a party: and the article ends by providing that "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court".

The Court, therefore, may derive jurisdiction in two ways, (*a*) by a special agreement referring a particular dispute to it, concluded when the dispute has arisen; (*b*) under the "optional clause" and other treaties and conventions by which the parties agree that if differences arise between them with regard to certain matters, or it may be with regard to any matter, such differences shall be submitted to the Court for decision. Though the jurisdiction arises in both classes of case by virtue of agreement, the latter jurisdiction—being derived from instruments concluded prior to the dispute and without special reference to the actual dispute which has arisen—is commonly described as the "compulsory jurisdiction" of the Court, in contradistinction to the former jurisdiction emanating from *ad hoc* references of particular disputes, which is termed its "voluntary jurisdiction". The rules of the Court provide two methods by which proceedings before the Court may be initiated, (*a*) by unilateral application; (*b*) by the deposit of a special agreement.

The former method is only available where the Court has with reference to the dispute in question "compulsory jurisdiction", and the latter method may, if the parties combine to employ it, be used instead of an application in a case where the Court has compulsory jurisdiction, and must be used in all cases where it has not.

The Court has given a large number of decisions on the question whether it had or had not jurisdiction to decide a particular case or to deal with a particular point or issue in a case. These decisions fall into two classes: (1) Decisions given in cases where one of the parties contended that the case or a particular issue in a case was not covered by the terms of the instrument which was alleged by the other to have conferred jurisdiction on the Court; (2) Decisions where the parties were agreed in requesting the Court to decide a certain point or to follow a certain course, and the question was whether the Court could, consistently with its Statute, do what both parties wanted it to do. It will be convenient to take the latter class of case first.

Jurisdiction of the Court by virtue of consent of Agents during the proceedings.

The Court's jurisdiction always depends immediately or ultimately upon the consent of the parties. The Court has, however, held that the consent of the Agents of the parties during the proceedings sufficed to give it jurisdiction to decide a point relevant to the case before the Court but not covered by the instrument (whether special agreement or previous treaty conferring obligatory jurisdiction) from which the Court's jurisdiction to deal with the case was derived. Thus in the *Mavrommatis*[1] case, when the case came before the Court for the second time after the Court had held that it had jurisdiction under Article 26 of the mandate,[2] the Court held it had jurisdiction to decide, if necessary, two points which did not arise out of the interpretation or application of the mandate, the first by reason of a consent of the parties contained in the written pleadings, and the second by reason of the consent of the parties expressed orally by their counsel (in the presence of their Agents) before the Court.

In the *Chorzow Factory* case[3] Poland made a counter claim to Germany's claim for pecuniary compensation, and Germany in the written pleadings expressly waived any objections, if there were any, to the jurisdiction of the Court to pronounce on this counter claim, and the Court said:

> "Article 36 of the Statute establishes the principle that the Court's jurisdiction depends on the will of the parties; the Court, therefore, is always competent once the latter have accepted its jurisdiction, since there is no dispute which states entitled to appear before the Court cannot refer to it, save in exceptional cases where a dispute may be within the exclusive jurisdiction of some other body."

and gave judgment on this counter claim.

Question whether dispute is a dispute of an "international character" (Article 14 of the Covenant).

In the *Serbian Bonds* case and in the *Brazilian Bonds*[4] case there was a division of opinion in the Court as to whether the Court could decide a question which the parties had submitted by special agreement. Reference to these cases has already been made in Part I of this article.[1] The former case was brought before the Court in the following way:

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[1] *Publications of the Court*, Series A, No. 5, at pp. 27–8. Decision on the merits.

[2] For the facts see p. 5 *supra*.

[3] Series A, No. 17, at p. 37; see also *supra*, p. 22.

[4] *Publications of the Court*, Series A, Nos. 20–21.

The French bondholders had requested the French Government to intervene, and, in the diplomatic negotiations which followed, the French Government held "that the bondholders were justified in claiming payment in gold currency" and the Serbian Government maintained that payment was due only in French paper francs. The two Governments had then concluded a special agreement submitting the question to the Court, and the special agreement defined the dispute by stating, on the one hand, the contentions of the Serbian Government, and, on the other, those of the French bondholders.

The question being one which (1) was governed entirely by municipal law; (2) concerned the private rights of individuals; and (3) was described in the special agreement by contrasting the contentions of the Serbian Government on one side and the French bondholders on the other, the Court had to consider whether, under the instruments governing its jurisdiction, it could deal with it.

The Court held:

(*a*) That though under Article 14 of the Covenant of the League of Nations it only had jurisdiction to determine disputes of an "international character", and though under Article 34 of its Statute only states or Members of the League of Nations could be parties in cases before the Court, the dispute in the present case satisfied these requirements, since, though the matter at issue was primarily a dispute concerning the obligations in municipal law of the Serbian Government towards private individuals, the French Government had intervened in the exercise of its right to protect its nationals, and a dispute had then arisen between the French and Serbian Governments on this same issue (i.e. an international dispute), and, in spite of the wording of the special agreement, it was this dispute which was submitted to the Court, and the parties before the Court were the two Members of the League of Nations, France and Jugoslavia, since the case was submitted to the Court by the two Governments.

(*b*) That, though Article 38 of the Court's Statute provides that the Court shall apply international conventions, international custom, general principles of law, judicial decisions, &c., this article cannot be regarded as precluding the Court from dealing with a dispute which does not require the application of any rule of international law, since the Court has jurisdiction to decide disputes relating entirely to questions of fact requiring the application of no rule of law. The Optional Clause (paragraph 2 of Article 36 of the Statute) shows that this is so, since amongst the classes of questions which states may bind themselves in advance to submit to the Court is "the existence of any fact which, if established, would constitute a breach of an international obligation", and Article 13 of the Covenant includes this class of disputes amongst those which the Members of the League agree are generally suitable for arbitration or judicial settlement. The parties may, for instance, agree that the facts, if established, would constitute a breach of an international obligation, and thus leave no question of international law for decision.

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[1] *supra*, p. 17.

Moreover, the first paragraph of Article 36 of the Statute provides that the "jurisdiction of the Court comprises *all cases* which the parties refer to it", and is quite unqualified.[1]

Since any question of fact may be submitted to the Court by the parties, there is no reason why the parties should not be able to submit a question of municipal law rather than a pure question of fact.

Consequently, though in general the Court's primary function is to decide disputes between states on the basis of international law, as Article 38 shows, and these will naturally be the most frequent, and though in general a state cannot take up a case on behalf of its nationals before an international tribunal where there are legal remedies in municipal law still open to the individuals concerned, and though in general when it does take up a case on behalf of its nationals it can (as the Court had held in its judgments Nos. 2 and 8) only assert its own right, i.e. its right to ensure respect for the rules of international law, and not the right of its nationals in municipal law, yet if the parties have agreed in a matter affecting one of them to have recourse to the Court before these remedies are exhausted, and if the parties have agreed to refer to the Court a question of municipal law and not the question whether any obligation in international law has been infringed, the Court has jurisdiction to entertain it.

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[1] The Court might also have added that the first paragraph of Article 13 of the Covenant provides that the Members of the League will submit to arbitration or judicial settlement "any dispute which they recognize to be suitable for submission to arbitration or judicial settlement", and paragraph 3 says that for the consideration of any such dispute the Court to which the case is referred shall be the Permanent Court of International Justice or any tribunal agreed on by the parties.

For these reasons the Court held that it had jurisdiction to entertain this case.[1, 2]

Though the Court succeeded in holding that it had jurisdiction in this case, it is clear that the form in which the French Government had presented its case caused the Court some difficulty and that the Court will (even if there is a special agreement) only accept jurisdiction where the Governments constitute themselves the real parties to the dispute and accept responsibility for all contentions put forward. The Court will not give decisions upon the contentions of private persons.

The Court has no power to give opinions except at the request of the Council or Assembly under Article 14 *of the Covenant.*

In the *Free Zones* case,[3] to which reference has already been made above,[4] the parties in their special agreement requested the Court to take rather a peculiar course. The special agreement submitted certain questions relating to the interpretation of Article 435 of the Treaty of Versailles to the Court for decision, but asked the Court, after hearing the arguments of the parties and concluding its deliberations, but *before* giving any decision, to make an

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[1] Judge Pessoa (p. 62) dissented from this view and held that the Court had no jurisdiction to entertain this case, and that under Articles 13 and 14 of the Covenant and Article 38 of the Statute the parties could only submit to the Court disputes of an international character which were governed by international law, and that a state, in having recourse to the Court in a matter which it has taken up in the interests of its nationals, must be claiming some right for itself under international law, and that the Court itself in its decisions in Judgments No. 2, pp. 12 and 16, and No. 13, pp. 27 and 28, had recognized this, and that since in this case no right under international law was claimed and the case only concerned the rights of individuals in municipal law, the Court had no jurisdiction and the parties could not by agreement confer it. He held further that the terms of Article 36, paragraph 2 (the optional clause jurisdiction) were not relevant in determining the jurisdiction of the Court under Article 36, paragraph 1, and Article 38 (the ordinary jurisdiction of the Court), and in any case this case would not be covered by paragraph (*c*) of Article 36, paragraph 2, since no breach of any international obligation was alleged.

[2] The Court also said, with reference to the special nature and form of the questions referred to it in this case: "Where, as in the present case, a dispute between states submitted to the Court concerns an obligation of one of them in municipal law towards individuals, and the special agreement is so drafted as to show that this—the obligation in municipal law—is the question to be determined, facts, such as certain acts of the other state, which would be relevant if the question submitted were the rights of the two states in international law, must be regarded as irrelevant." Such facts were in this case the conduct of the French Government which, when financing Serbia during the war, had itself treated these loans as payable in paper francs (p. 20). Judge Pessoa, dissenting (p. 69), apparently held himself entitled to take these facts into consideration since the French Government was a party to the case.

[3] *Publications of the Court,* Series A, No. 22.

[4] *supra*, p. 13.

order fixing a certain time during which the parties should be free to settle the dispute out of court and then, if no settlement was reached, to give its decision. The Court was, however, asked to communicate "unofficially" to the Agents of the parties, *at the time it made its order* fixing this time, indications of the conclusions to which it had come on the issues submitted to it for decision, and on which, if necessary, it would give judgment at a later date. The parties in effect wanted to be informed of the opinion of the Court on the main points in the issues in dispute before they began to try and settle the case out of Court. The reasons prompting the parties to make this request are easily intelligible, and the Court was obviously very desirous of doing whatever it could to assist in the settlement of the dispute, but it found great difficulty in finding a means by which it could, consistently with its Statute, do what the parties wanted.

The Court said[1] that even if the parties consent or request the Court to do so, the Statute of the Court (and in particular Articles 54, paragraph 3[2], and 58[3]) does not allow the Court to communicate its *opinion*, after deliberation, upon a question submitted to the Court for decision, and the Court cannot, even with the consent of the parties, depart from the terms of its Statute, though it may in such circumstances depart from its Rules of Court.

In this case, however, the Court was asked, under the terms of the special agreement, before delivering its judgment, to make an interlocutory order giving a specified time for the parties to settle the case, and the Court, in view of the fact that the communication of its opinion, which the parties desired, was calculated to facilitate a settlement of the dispute, found it possible to express the opinion desired by the parties *in the form of reasons for making the interlocutory order*; interlocutory orders and the reasons therefor having, under Articles 59 and 60 of the Statute, no binding force or final effect on the merits of the case: but the Court indicated that the course it had thus taken was strictly exceptional, and that in future special agreements submitting cases to the Court must be formulated with due regard to the provisions of the Court's Statute governing its activity.

The Court, therefore, found itself able in this case to do what the parties wanted by an ingenious, but still rather patent, device, namely, to indicate its opinion on the merits of the case in the form of reasons for the order fixing the time for negotiations for a settlement. The citations from this case on points of substantive law which have been given in the first part of this article are extracted from what purport to be reasons for this interlocutory order. But the Court gave a clear warning that its action in this case could not be taken as a precedent and that parties must have regard to the Court's powers under its Statute. The Court said clearly that it had no power to give an advisory opinion at the request of states, even if they agreed in asking for it. It could only do this at the request of the Council or Assembly of the League.[1]

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[1] *l.c.*, pp. 12–13.

[2] "The deliberations of the Court shall take place in private and remain secret."

[3] "The judgment shall be signed by the President and Registrar. It shall be read in open court."

Judge Pessoa, indeed, dissented and held that the Court was not entitled to do what it did. He said that the Court's opinion on the merits of the issues submitted could not be made relevant to the interlocutory order and that the Court was not entitled to give opinions at the request of individual states.[2]

Interpretation of special agreements submitting questions to the Court.

The Court in the *Free Zones* case also made the two following pronouncements of general interest on the interpretation of special agreements submitting disputes to the Court:

(*a*) That in cases of doubt the Court must, if possible, construe the provisions of a special agreement in such a manner as to enable appropriate effect to be given to them without doing violence to their terms.[3] (It was on this ground that the Court justified the action which it took, although the special agreement submitting the case to the Court did not specify action of this kind.)

(*b*) That, if the Court's decision on the interpretation of a treaty is requested and the special agreement sets out two alternative interpretations, the Court cannot regard itself as compelled simply to choose between these two interpretations if it considers that neither is quite correct, but is free to give the interpretation which it in fact considers to be correct.[4]

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[1] See also *Polish Upper Silesia* Case, *Publications of the Court*, Series A, No. 6, at p. 21, where the Court says: "A request [for an advisory opinion] directly submitted by a state will not be considered."

[2] *Publications of the Court*, Series A, No. 22, p. 48.

[3] *l. c.*, p. 13.

[4] *l. c.*, p. 15.

Objections to the jurisdiction: when and how they must be taken; effect of failure to take objection at the proper time; must the Court raise issues of jurisdiction ex officio?

We now come to the decisions of the Court in cases where its jurisdiction is contested by one party.

In the *Mavrommatis* case[1] the Court held that if an objection to the jurisdiction was raised *in limine litis*, it was the duty of the Court under the last paragraph of Article 36 of its Statute, before expressing any opinion on the merits, to satisfy itself that it had jurisdiction over the suit before it, in the form in which it was presented and on the basis of the facts existing at the moment; and that it must go into the facts of the case sufficiently to decide finally whether this was so.[2] It could not, upon an objection to the jurisdiction, be content merely to form a provisional conclusion on this point. The Court distinguished its own duty under Article 36 of its Statute, when an objection to the jurisdiction is raised, and that of the Council of the League under paragraph 8 of Article 15 of the Covenant, when a claim is made by a party that the dispute is one falling exclusively within its domestic jurisdiction where the Council only has to see if a plausible legal claim is made out.[3, 4]

In this case, however, the Court accepted jurisdiction, although one of the essential grounds on which the Greek application was based was lacking at the time of the institution of the proceedings, at the time the objection to the jurisdiction was taken and at the time when the oral proceedings before the Court took place, though it existed at the moment when the Court delivered its judgment.

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[1] *Publications of the Court*, Series A, No. 2, at p. 16.

[2] See *infra*, p. 41.

[3] See *supra*, p. 29, footnote 1.

[4] The decision on the question of jurisdiction in the case of *Certain German Interests in Upper Silesia* (see *Publications of the Court*, Series A, No. 6, at pp. 14–15) follows the same lines: Germany's application alleged action by Poland in conflict with certain articles of the Geneva Convention between Poland and Germany. Disputes concerning these articles were, under a later provision, to be submitted to the Court. Poland objected to the jurisdiction on the ground (*inter alia*) that the real dispute was not as to the interpretation of these articles but the meaning of a Polish law and the effect of Article 256 of the Treaty of Versailles. The Court said (1) neither the terms of the German application, (2) nor the objections raised by Poland, could be treated as conclusive on this issue. The Court had, on the plea to the jurisdiction, to investigate the case and discover if the matters in dispute really did or did not relate to the interpretation or application of treaty provisions which the Court had been given jurisdiction to interpret (i.e. whether or not the decision on the merits of the case would depend on these provisions) although that investigation might render it necessary to touch on subjects belonging to the merits.

This essential ground was Protocol XII[1] which only came into force after the hearing before the Court.

The Court based their judgment on this point *either* on the ground that the relevant time for appreciating whether the necessary facts existed to found jurisdiction was the date of the delivery of the judgment, *or* on the ground that this was a purely technical objection which could have been automatically cured by the submission of a fresh application after the date of the coming into force of the Protocol, and the Court as an international tribunal need not attach the same degree of importance to technical and formal points as a municipal tribunal. It is not quite clear whether the Court relied on both these grounds or not.[2]

In his dissenting opinion in this case Judge Moore expressed *obiter* the view that it was the Court's own duty to take objections *ex officio*, on the ground that it had no jurisdiction if this was the case, whether the parties to the proceedings took the point or not.[3] This is not, however, the view which has prevailed. In a case between Poland and Germany concerning the *Rights of Minorities in Upper Silesia*,[4] Germany instituted a suit by application, complaining that certain action taken by Poland with regard to German minority schools was contrary to a convention of 1922 between the two countries. The application was based upon Article 72 (3) of the convention, which gave the Court jurisdiction with regard to the interpretation and application of the *preceding* articles. Germany's application, however, invoked not only certain preceding articles, viz. Article 69, but also other articles following Article 72, viz. Articles 74 and 131. The Polish countercase pleaded that the suit should be dismissed, but contained arguments relating to the interpretation of Articles 74 and 131 as well as of the articles which came before Article 72. The German reply introduced certain changes into the form of the German contentions, and also made it clear that Germany was contending that the Court had, under Article 72, compulsory jurisdiction not only with regard to articles of the convention coming before Article 72 but also with regard to the later articles of the convention. Poland, in her rejoinder, then pleaded that under Article 72 the Court had no jurisdiction with regard to these later articles, and that all German contentions based on these articles should be rejected on the plea of no jurisdiction, though she admitted jurisdiction with regard to the rest of the case and expressed the view that the Court could deal with both the objection to the jurisdiction and the merits of the other contentions together at the hearing on the merits.

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[1] See for the facts of this case p. 5 *supra*.

[2] *Publications of the Court*, Series A, No. 2, p. 34. Judge Moore, dissenting, thought the case should have been dismissed on this ground—see p. 57.

[3] *l. c.*, pp. 57–9.

[4] *Publications of the Court*, Series A, No. 15.

The Court held that Poland was right in contending that under Article 72 it had no compulsory jurisdiction with regard to Articles 74 and 131, but rejected Poland's plea to the jurisdiction as regards contentions based on these articles, on the ground that it was made too late. The Court referred to Article 38 of the Rules of Court, which provides that, where proceedings are begun by application, any preliminary objection shall be filed after the filing of the case and within the time fixed for filing the counter-case, and said that though the article only dealt with objections to the jurisdiction submitted as a preliminary question, this must not be taken to mean that objections to the jurisdiction not filed as preliminary objections can be heard at any stage of the proceedings. The Court had, under Article 36 of the Statute, jurisdiction over any matter which the parties referred to it (though it might have to decline to act if the matter submitted was one which fell within the exclusive jurisdiction of some other authority). The Court was not, therefore, obliged *ex officio* to satisfy itself that it had jurisdiction, nor even to consider an objection to the jurisdiction at any stage of the proceedings. Article 36 of the Statute—("all cases which the parties refer to it")—does not require the acceptance of the Court's jurisdiction to be expressed in any particular form, and the Court referred to the *Mavrommatis* case[1] where the consent of the Agents given orally before the Court had been held to be enough to found jurisdiction to decide a particular point connected with the case founded on a clause in the mandate giving the Court compulsory jurisdiction but not covered by that clause. The consent of a state to the submission of a question to the Court may, in the Court's opinion, not only result from an express declaration but be inferred from its conduct, and the Court held that the submission of arguments on the merits without making any reservation as to the jurisdiction must be regarded as an unequivocal indication of the party's desire to obtain a decision on the merits. If a party once accepts the jurisdiction of the Court with regard to a particular question, then that party cannot afterwards go back upon it, and this applies just as much where the acceptance of the jurisdiction is inferred from its conduct in

[1] *Publications of the Court,* Series A, No. 5, p. 27—see *supra,* p. 32.

pleading to the merits as where it has taken the form of express declaration. The party would, in these circumstances, only be released from his acceptance of the jurisdiction if, after the acceptance, the claim had been so modified that the consent given on the basis of the original claim could not be held to apply to the claim in its modified form.[1,2]

Interpretation of clauses giving jurisdiction to determine differences arising out of interpretation and application of a treaty.

(a) *To what extent has Court jurisdiction to determine questions relating to other treaties?*

It has often happened that, in disputes brought before the Court as differences relating to the application of a treaty containing a clause giving the Court jurisdiction, questions relating to other treaties containing no such clause have arisen. For instance in the *Mavrommatis* case[3] the case came before the Court under Article 26 of the mandate which gave it jurisdiction to determine differences relating to the application of the mandate, but the case turned largely on Protocol XII which contained no such clause. The Court held that it had jurisdiction to interpret Protocol XII in so far as its interpretation was necessary to determine whether the Mandatory *was exercising a power conferred by Article* 11 *of the Mandate* in a manner inconsistent with Protocol XII, because the power given in Article 11 was conditional on international obligations being observed. But when the case

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[1] There was considerable difference of opinion in the Court on this point. Judges Huber and Nyholm and Deputy Judge Negulesco dissented. The minority differed (i) on the effect of the contentions in the Polish counter-case, holding that they must be interpreted as meaning that the German contentions should be dismissed on the merits so far as they were based on articles covered by Article 72 (3), and that Poland had objected to the jurisdiction as regards the later articles as soon as it became clear that Germany was putting a different interpretation on the Court's jurisdiction under Article 72 (3); (ii) in thinking that, though for the purposes of conferring on the Court jurisdiction to determine additional points in connexion with a case already submitted, no notification of a special agreement to that effect under Article 40 of the Statute was required, nevertheless an agreement *ad hoc* was required and a pleading to the merits of a claim—partly within the jurisdiction—could not be construed as a reference to the Court, within the meaning of Article 36 of the Statute, of the points outside the jurisdiction. The Court could not under Article 36 acquire jurisdiction by indirect inference from the conduct of the parties' agents. Judge Nyholm, indeed, seemed to go farther in thinking that the notification of a special agreement under Article 40 was required.

[2] The decision of the Court on this point proceeds on a principle very similar to that followed in the English courts in cases where their jurisdiction depends upon the submission of a party to the jurisdiction. Pleading to the merits is held by the English courts to constitute an irrevocable submission giving jurisdiction.

[3] *Publications of the Court*, Series A, No. 2. For the facts of this case see *supra*, p. 5.

was brought before the Court a third time[1] by Greece, on the ground that Great Britain had failed to readapt the concession in accordance with the Court's judgment in the last case because she had delayed too long in doing so and had, therefore, failed to comply with Protocol XII, the Court held that it had no jurisdiction. Whether Great Britain was right or wrong she was not, in the matter of the adaptation of the concession, exercising any power under Article 11 and consequently the Court had no jurisdiction under Article 26, and had not been given jurisdiction to determine whether Great Britain had or had not duly adapted the concession as required.

Similarly, in the *Polish Upper Silesia* cases[2] the Court had jurisdiction under the Geneva Convention to determine whether certain dispossessions of property carried out by Poland in Upper Silesia were contrary to the provisions of the Geneva Convention. One of Poland's defences was that Germany could not complain of these dispossessions of property because the German nationals had only acquired the property from the German state, and under Article 256 of the Treaty of Versailles German state properties had passed to the Polish state. Germany disputed this interpretation of Article 256. The Court held that it had jurisdiction to determine the difference relating to Article 256, because it was an essential preliminary to the decision whether a breach of the Geneva Convention had been committed.[3]

Nevertheless, the Court said in its first judgment in the *Mavrommatis* case[4] that if the other treaty, whose interpretation was thus incidentally involved, contained an express provision excluding the jurisdiction of the Court to interpret it (i.e. instead of merely containing no provision one way or the other), then the other party could rely on this express agreement and the Court would be debarred from considering its interpretation at all. Therefore, if in that case Protocol XII had contained any provision of this kind, the Court could not have dealt even incidentally with any difference as to its interpretation.[5]

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[1] *Publications of the Court*, Series A, No. 11.

[2] *Ibid.*, No. 6, p. 18; and No. 7, p. 25.

[3] "It is true that the application of the Geneva Convention is hardly possible without giving an interpretation of Article 256. . . . These matters then constitute merely questions preliminary or incidental to the application of the Geneva Convention. Now the interpretation of other international agreements is indisputably within the competence of the Court, if such interpretation must be regarded as incidental to a decision of a point in regard to which it has jurisdiction." *Publications of the Court*, Series A, No. 6, p. 18.

[4] *Ibid.*, No. 2, p. 29.

[5] This point is of some importance, since it shows that an agreement in a particular

(*b*) *Has the Court jurisdiction to decide what reparation is payable for the contravention of such a treaty?*

In one of the judgments in the *Chorzow Factory* affair between Germany and Poland,[1] the Court decided that Article 23 of the Geneva Convention, conferring jurisdiction on the Court to decide disputes relating to the interpretation and application of the convention, must be interpreted as also giving the Court jurisdiction to determine any dispute relating to the reparation payable for a breach of the convention.

The Court had already in a previous judgment[2] decided that Poland had committed a breach of the convention in dispossessing two German companies from the Chorzow factory. After this judgment was delivered, Germany and Poland endeavoured unsuccessfully to settle directly the reparation payable, and Germany then filed an application under Article 23 claiming certain damages. Poland disputed the jurisdiction on the ground that there was no dispute here relating to the interpretation or application of the convention, and that the Court had no jurisdiction under Article 23. The Court said: "Differences relating to reparations, which may be due by reason of failure to apply a convention, are differences relating to its application".[3]

(c) *Has the Court jurisdiction to determine whether the reparation payable for a contravention of such a treaty may be set off against another claim possessed by respondent state against the applicant state?*

In the *Chorzow Factory* case,[4] when the affair was before the Court on the question of the amount of damages, Germany asked for a decision to the effect that Poland would not be entitled to set off against the damages payable any pecuniary claims which she had against Germany. Germany's request was prompted by the fact that the negotiations for a settlement between the two countries had in fact broken down on this point. Poland, however, had not pleaded any set-off and merely contended that Germany's application on this point should be dismissed, and on this ground the Court declined to give any decision on this contention.[5]

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treaty not to refer differences arising out of it to arbitration, or to refer them to some other body, would take precedence over general obligations contained in, for instance, the Optional Clause, so far as questions relating to this treaty were concerned.

[1] *Publications of the Court*, Series A, No. 9.

[2] *Ibid.*, No. 7.

[3] *Ibid.*, No. 9, at p. 21.

[4] *Ibid.*, No. 17.

[5] *Ibid.*, No. 17, pp. 61–2.

The Court did say, however, that the jurisdiction which it possessed under the convention to determine the reparation payable for a breach of the convention included jurisdiction to decide how the reparation was to be paid—the place and date of payment—by lump sum or by instalments, &c. It had power to give a decision ensuring that the reparation should be effectively paid, and if a set-off had been pleaded it would have had jurisdiction to deal with the plea. The Court did not make any pronouncement as to when or how a set-off may be relied upon in international law, nor on the question whether a set-off could be relied upon against a judgment debt. If the principle of set-off is admitted at all—and the Court's judgment does not contain any pronouncement on this point—then a remarkable extension of the Court's jurisdiction may arise under a plea of set-off, because it appears that the Court would have held that it had to decide whether the claim, on which the set-off was based, was or was not valid, although arising out of another matter altogether, with respect to which the Court had no jurisdiction.[1]

(d) *What constitutes a "dispute" or "difference" within the meaning of these clauses, for the purpose of giving the Court jurisdiction?*

In the clauses in treaties conferring jurisdiction on the Court, the Court is given jurisdiction to decide "disputes" or "differences" between states, and the point has more than once been taken by respondent states that the application is premature because no dispute or difference between the states has really arisen, and therefore the Court has no jurisdiction. The Court has never hitherto accepted this plea. It was advanced for the first time before the Court by Great Britain in the *Mavrommatis* case.[2] In that case, under Article 26 of the mandate, Greece had to show that there was a dispute between her and Great Britain which could not be settled by negotiation. The facts were that there had been a long correspondence, producing no agreement, between Monsieur Mavrommatis's solicitors and the Colonial Office; one or two entirely unofficial notes had been exchanged between the Secretary of the Greek Legation and a subordinate official in the Foreign Office; and an official note from the Greek Legation asking for arbitration, in reply to which the Foreign Office gave the British Government's views on the case, whereupon the Greek

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[1] The *dicta* of the Court on this question are, however, not very easy to follow and the writer is not sure whether he has correctly interpreted them.

[2] *Publications of the Court*, Series A, No. 2. For the facts see *supra*, p. 5.

Legation sent a note to the effect that the Greek Government had decided to submit the matter to the Court under Article 26.

The minority of the Court, in particular Lord Finlay and Judge Moore, delivered strong opinions to the effect that in this case the Greek Government had acted prematurely, on the grounds, in particular, that it had never in fact formulated its own claims in this case at all, and therefore clearly could not show that there was no chance of these claims being settled by negotiation between the Governments; the negotiations between the solicitors of Monsieur Mavrommatis and the Colonial Office had, indeed, clearly defined the differences between those parties and also the claims of Mavrommatis, but, when the Greek Government took up the case, it entered a different sphere, the sphere of international law, and Great Britain was entitled to know and to consider what were the claims of Greece, which might or might not be exactly the same as those advanced by its national. Judge Moore also said that the unofficial correspondence between a member of the staff of the Greek Legation and a member of the staff of the Foreign Office was nothing more than the exercise of "good offices", and in no way constituted or defined the claim of the Greek Government, since "it is an elementary and familiar principle that the use of good offices does not imply the existence of a right to intervene, or in other words to make an official demand or raise an international dispute".[1]

The Court took the view that on the facts of this case the Greek Government was entitled to maintain that, at the moment when it made its application to the Court, it was clear that there was no chance of settling the case by negotiation between the Governments and that (though it is by no means always necessarily so) it was clear that the claim of the Greek Government was exactly the same as that of its national, and therefore it was unnecessary to go over the whole ground again in official diplomatic correspondence:

> "The Court realizes to the full the importance of the rule laying down that only disputes which cannot be settled by negotiation should be brought before it. It recognizes, in fact, that before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations. Nevertheless, in applying this rule, the Court cannot disregard, amongst other considerations, the views of the states concerned, who are in the best position to judge as to political reasons which may prevent the settle-

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[1] *Publications of the Court*, Series A, No. 2, p. 64. The opinion of Judge Moore in this case contains a most useful exposition of the whole position with regard to diplomatic intervention on account of injuries to nationals.

ment of a given dispute by diplomatic negotiation. When negotiations between the private person and the authorities have already—as in the present case—defined all the points at issue between the two Governments, it would be incompatible with the flexibility which should characterize international relations to require the two Governments to reopen a discussion which has in fact already taken place and on which they rely." [1]

The difference of opinion between the majority and minority of the Court lay, not so much in the principles to be applied, but in the application of the facts in the light of these principles.[2]

Interpretation and application of the Statute and Rules of Court in matters other than questions of jurisdiction.

(a) *Advisory opinions : Right of interested parties to have national judges on bench.*

There is a passage in the opinion of the Court on the *Interpretation of the Greco-Turkish Agreement of* 1st *December* 1926[3] which shows that the Court held that Article 31 of the Statute, entitling the contesting parties to have on the bench a judge of their nationality, applies in cases where the Court is asked for an advisory opinion in a matter which is an existing dispute between two states. This is another instance of the careful assimilation of the advisory procedure to the ordinary procedure.[1]

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[1] *Publications of the Court*, Series A, No. 2, p. 15.

[2] The same plea was raised by Poland in the *Upper Silesia* case (Series A, No. 6, see p. 14) but Article 23 of the Geneva Convention did not contain the words "which cannot be settled by negotiation", nor did the Court deal with the facts prior to the making of the application by Germany. The Court simply said: "Now a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views. Even if, under Article 23, the existence of a definite dispute was necessary, this condition could at any time be fulfilled by means of unilateral action on the part of the applicant party. And the Court cannot allow itself to be hampered by a mere defect in form, the removal of which depends solely on the party concerned."

The same point arose also in the suit relating to the *Interpretation of Judgments Nos.* 7 *and* 8 (Series A, No. 13, at p. 10): Article 60 of the Court's Statute provides that "in the event of a dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party", and when Poland objected to Germany's application on the ground that there was no dispute, the Court said: "According to the tenor of Article 60, the manifestation of the existence of the dispute in a specific manner, as for instance by diplomatic negotiations, is not required. It would no doubt be desirable that a state should not proceed to take as serious a step as summoning another state to appear before the Court without having previously, within reasonable limits, endeavoured to make it quite clear that there is a difference . . . which has not been capable of being otherwise overcome. But in view of the wording of the article, the Court considers that it cannot require that the dispute should have manifested itself in a formal way; according to the Court's view it should be sufficient if the two Governments have, in fact, shown themselves as holding opposite views in regard to the meaning or scope of a judgment of the Court."

[3] *Publications of the Court*, Series B, No. 16, at p. 8. Greece and Turkey, however, both waived the right in this case.

(b) *Article* 60 *of the Statute : "In the event of a dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.*"

The Court has dealt with two applications under Article 60. In the first case[2] it dismissed the application on the ground that it could not, upon an application under Article 60, deal with any matter which was not dealt with in the judgment itself or go outside the scope of the matters referred to the Court under the special agreement under which the judgment was given. In the second case,[3] the Court gave an important definition of its jurisdiction under Article 60. The Court said that it should, under Article 60, only give interpretations as to what in a judgment had or had not been decided with binding force between the parties—that is to say it should determine whether or not any point in the judgment did or did not constitute a decision as opposed to the reasoning on which the decision was based, the decision being binding as a judgment and the reasoning not being binding: and it would interpret the exact effect of anything which was a part of the decision but would not interpret parts of the judgment which were merely part of the grounds of the decision.[4] The Court said that since the interpretation added nothing to the judgment which had already acquired the force of *res judicata*, no objection could be raised to an application for an interpretation based on the ground that the issues raised touched on another case before the Court or elsewhere.[5]

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[1] The Court also in this case (p. 14) called attention to Article 72 of the Rules of Court, providing that the request for an opinion shall contain an exact statement of the question on which an opinion is required. The Court found that in that case the request was so badly formulated that it did not really define the question at issue, and had first to define the question for itself and then answer it.

[2] *Publications of the Court*, Series A, No. 4.

[3] *Ibid.*, No. 13, *Interpretation of Judgments Nos.* 7 *and* 8 (Chorzow Factory), at pp. 10 and 11.

[4] Judge Anzilotti dissented, not upon the principles applied, but on the ground that the present application did not disclose any difference as to the meaning of the operative part of the judgments.

[5] The Court also called attention in this case to Article 66 of the Rules of Court which requires a party, when making an application for the interpretation of a judgment, to give "an indication of the precise points in dispute and observations and explanations", and not, as in other applications under Article 40, "an indication of the claim" and "conclusions". Germany had not, in fact, in her application followed the requirements of Rule 66, but the Court, not thinking it its duty to rely too much on questions of form, treated Germany's "conclusions" as "indications of the points in dispute".

(c) *Article* 41 *of the Statute and Article* 57 *of the Rules of Court.*

Provisional Measures.

The Court has had two applications under Article 41 of the Statute for the indication of the provisional measures which ought to be taken to preserve the respective rights of the parties pending the decision of the case. The first was an application by Belgium,[1] arising out of the unilateral abrogation by the Chinese Government of a treaty of 1865 between Belgium and China which had created a dispute which Belgium claimed the right to refer to the Court under the Optional Clause. China took no part in the proceedings. The President of the Court made an order indicating what provisional measures it considered should be adopted, stating that he did so on the ground that the infractions of Belgium's rights under the treaty (if Belgium had such rights) would not be of the kind that could be "made good simply by the payment of an indemnity or restitution in some other material form". This order was later revoked, on the application of Belgium, after the conclusion of an agreement between Belgium and China.[2]

The second case was an application by Germany in connexion with the Chorzow factory.[3] Germany had already obtained judgments from the Court establishing (i) that Poland's dispossession of the two German companies was contrary to an international obligation; (ii) that the Court had jurisdiction to decide the dispute with regard to the damages payable for this dispossession. Germany now asked for an order for the payment of a certain sum in advance by way of damages as a measure of interim protection, on the ground that, through the loss of their factory and their capital, the German companies were losing their market.

The Court dismissed the application, holding that the German application could not be considered as relating to any measure of interim protection, but only as designed to obtain an interim judgment in Germany's favour on the merits of the claim for damages, and thus fell outside the scope of Article 41 of the Statute.

(d) *Declaratory Judgments.*

In the *Polish Upper Silesia* case[4] Germany's application requested the Court to give an interpretation of certain articles of the Geneva Convention. The application was based on Article 23 of the Convention, giving the Court jurisdiction to determine disputes as to its interpretation and application. Poland objected to the application, on the ground, *inter alia*, that the Court had no jurisdiction to give a purely declaratory judgment, and cited in support of her objection Article 59 of the Statute.[1] The Court said:

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[1] *Publications of the Court,* Series A, No. 8.

[2] *Ibid.,* No. 18.

[3] *Ibid.,* No. 12.

[4] *Ibid.,* No. 7, at p. 18.

> "Article 59 of the Statute, which has been cited by Poland, does not exclude purely declaratory judgments. The object of this article is simply to prevent legal principles accepted by the Court in a particular case from being binding upon other states or in other disputes."

The Court also referred to Article 36 (2) (*a*), where the interpretation of a treaty is specially mentioned as one of the types of case included under the Optional Clause, and to Article 63 of the Statute.[2, 3]

(e) *Article* 38 (4) *of the Statute.*

"*The Court shall apply . . .* (4) *. . . judicial decisions . . . as a subsidiary means for the determination of rules of law.*"

In the *Mavrommatis* case[4] Judge Moore cited decisions of French and United States Courts in support of his view that no court should entertain a case over which it has no jurisdiction, and should refuse to do so *ex officio*, and he said that in doing so he was complying with Article 38 (4) of the Statute. In the *Lotus* case[5] the Court considered certain decisions of municipal courts which had been cited by the parties as evidence of state practice rather than of a rule of law. Lord Finlay, speaking of *R.* v. *Keyn*, emphasized the point that the English judges were in that case giving their views of international law, which is considered part of the law of England, and the case, though of course not binding authority, was therefore of some weight.[1] Judge Moore[2] gave his interpretation of Article 38 (4) in the following words:

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[1] Article 59 says: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

[2] Article 63 says: "Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith. Every state so notified has the right to intervene in the proceedings, but if it uses this right the construction given by the judgment will be equally binding upon it."

[3] In the same case the Court (at p. 34) called attention to the fact that under the Rules of Court (Article 40 (3)) the applicant must state his contentions ("conclusions"). Germany in that case asked the Court a question on one point: "What attitude by Poland would have been in conformity with the Geneva Convention?" The Court said that it could not answer this question, which was practically asking the Court for an advisory opinion. It could give judgment on contentions and say whether they were right or wrong, but it was not the Court's business to formulate contentions for the parties.

[4] *Publications of the Court*, Series A, No. 2, at p. 58.

[5] *Ibid.*, No. 10, at p. 28.

> "These directions merely conform to the well-settled rule that international tribunals . . . sitting in judgment between states, are not to treat the judgments of the courts of one state on questions of international law as binding on other states, but, while giving to such judgments the weight due to judicial expressions of the view taken in the particular country, are to follow them as authority only so far as they may be found to be in harmony with international law, the law common to all countries."

(3) *Rules of evidence, and other points of procedure.*

(a) *Use of preparatory documents for the purpose of interpreting a treaty.*

The Court has had to consider this point several times, and has laid down two rules:

(i) That, where the meaning of the text of a treaty is clear on the face of it, the records of the preparatory work of the conference at which the treaty has been drawn up cannot be invoked for the purpose of putting upon it a different meaning, and there is no reason to look at them:[3]

(ii) That the minutes of the preparatory work of a treaty cannot be used to determine its meaning, and are not admissible in evidence against a party to the treaty which did not take part in the preparatory work, and the fact that they have been published does not render them admissible.[4]

The Court has, so far, pronounced neither for nor against the more radical contention which has been advanced in proceedings before it, that these records are not admissible in evidence at all.

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[1] *l.c.*, p. 54.

[2] *l.c.*, p. 74.

[3] *Publications of the Court*, Series A, No. 10, at p. 16, the *Lotus* case; Series B, No. 14, pp. 28 and 31, *European Commission of the Danube*; Series B, No. 12, p. 22, *Article* 3 (2) *of the Treaty of Lausanne*; Series B, Nos. 2–3, p. 41, *Competence of the International Labour Organisation*; Series A, Nos. 20–1, p. 30, *Serbian Bonds*.

Nevertheless, in four of these cases, as in the proceedings a great deal of argument had been addressed to the Court based on these records, subject as a rule to preliminary objections to their admissibility by one or other of the parties, the Court did look at these records and held that in fact they merely confirmed the meaning of the text which was clear on the face of the treaty.

[4] *Publications of the Court*, Series A, No. 23, p. 42, *International Commission of the Oder*. In this case the Court did not look at the records at all. The treaty in this case was the Treaty of Versailles, and Germany was the party who did not take part in the preparatory work.

(b) *Interpretation of a treaty in two languages.*

The Palestine Mandate is in English and French, and the Court said, when interpreting Article 11 in the *Mavrommatis* case:[1]

> "The Court is of the opinion that, where two versions possessing equal authority exist, one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation, which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the parties. In the present case this conclusion is indicated with especial force, because the question concerns an instrument laying down the obligations of Great Britain in her capacity as Mandatory for Palestine, and because the original draft of the instrument was probably made in English."

General Rules of Interpretation, Maxims, &c.

In the *Wimbledon* case[2] the Court accepted, as a rule of interpretation, that provisions in a treaty imposing on a state limitations on the exercise of its sovereign rights, should, in case of doubt, be interpreted narrowly (but added that the conclusion of such a treaty is not an abandonment of sovereignty, the right of entering into international engagements being an attribute of sovereignty).[3]

In the *Oder* case,[4] however, the Court observed that this rule (i.e. that in case of doubt the meaning which involves the least restriction on the freedom of states must be adopted) is only to be employed in the last resort when all other methods of interpretation fail to indicate the meaning.[5]

In the *Danzig Postal Services* case[6] the Court said:

> "It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd."

In the opinion in the case of the *Tunis and Morocco Nationality Decrees*[7] the Court held that exceptions to general rules cannot be given an extensive interpretation.

In the *Serbian Bonds* case[8] the Court recognized and applied the rule *Generalia specialibus non derogant*; and also the rule that it is an elementary principle that in construing a contract meaning should be given to *all* its terms.[1]

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[1] *Publications of the Court*, Series A, No. 2, p. 19.

[2] *Ibid.*, No. 1, pp. 24–5.

[3] Cp. Opinion in the case of the *European Commission of the Danube*. "Restrictions on the exercise of sovereign rights accepted by treaty by the state concerned cannot be considered as an infringement of sovereignty." Series B, No. 14, at p. 36.

[4] *Publications of the Court*, Series A, No. 23, p. 26.

[5] Cp. Opinion in case of *Danzig Postal Services*, Series B, No. 11, at p. 39, where the same observation is made.

[6] *Publications of the Court*, Series B, No. 11, p. 39.

[7] *Ibid.*, No. 4, p. 25.

[8] *Ibid.*, Series A, Nos. 20–21, p. 30.

In the *Brazilian Loans* case the Court, in construing a prospectus issued by the Brazilian Government, said: "There is a familiar rule for the construction of instruments, that where they are found to be ambiguous they should be taken *contra proferentem*".[2]

(c) *Other points of practice and procedure.*

Point not taken in a party's written pleadings—Can Court take it ex officio?

In the *Oder* case[3] the Court adopted in its decision an argument (based on an admitted fact) in favour of Poland which Poland had never taken in her written pleadings and had only raised very tentatively at the hearing of the oral arguments when counsel for Great Britain objected to its admission on the ground that it would be contrary to the letter and spirit of the Rules of Court and the practice of arbitral tribunals to admit at an advanced stage of the proceedings new contentions which the opposing parties had been led to believe had been abandoned. The Court said that "it must examine *ex officio* all the legal results of admitted facts". It declined to accept another Polish argument which was inconsistent with the terms of the special agreement by which the case was referred to the Court.[4] The Court also insisted in that case that Poland should formulate in writing her contentions with regard to all the questions submitted to it in time for the opposing parties to deal with them.

Negotiations for a settlement: "without prejudice".

In one of the *Chorzow Factory* cases,[5] unsuccessful attempts had been made by Poland and Germany to settle the question of damages out of court, and when subsequently the case came before the Court on the question of damages the Court said, with reference to these negotiations:

> "The Court cannot take account of declarations, admissions or proposals which the parties may have made in the course of direct negotiations which have taken

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[1] *Publications of the Court*, Series A, Nos. 20–21, p. 32, *Serbian Bonds* case. The Court applied this principle as showing that the expression "*gold* francs" must be construed as meaning more than the word "francs" alone.

[2] *Ibid.*, Series A, Nos. 20–21, p. 114.

[3] *Ibid.*, No. 23, pp. 18–19.

[4] *l.c.*, p. 17.

[5] *Ibid.*, Series A, No. 9, at p. 19.

place between them; declarations which moreover have been made without prejudice in the event of the points under discussion forming the subject of judicial proceedings. For the negotiations in question have not . . . led to an agreement."

Estoppel.

In the *Serbian Bonds* case[1] the Court held (referring to the failure of the bondholders to protest against payment in paper francs for 14 years) that the conduct of parties to an agreement may be conclusive evidence of their intentions in concluding it, if its terms are ambiguous, but, if its terms are clear, such conduct is only relevant (if at all) as an estoppel.[2] Considering the matter then from the point of view of estoppel, the Court held that the failure of the bondholders to object to payment in paper francs for a number of years created no estoppel in this case, because

> "there has been no clear and unequivocal representation by the bondholders upon which the debtor state was entitled to rely and has relied. There has been no change in position on the part of the debtor state. The Serbian debt remains as it was originally incurred; the only action taken by the debtor state has been to pay less than the amount owing under the terms of the loan contracts."

Litispendence.

One of the objections to the jurisdiction raised by Poland in the *Polish Upper Silesia* case[3] was that the German application raised questions which formed part of a suit which one of the German companies concerned had instituted against Poland before the Germano-Polish Mixed Arbitral Tribunal, claiming the restitution of the Chorzow factory, and therefore the application should not be entertained until that tribunal had given judgment. The Court held that this was an objection which must be dealt with before it could consider the merits of the case. The Court refrained from deciding (though it observed that the question was doubtful) whether the doctrine of *litispendence*—the object of which is to prevent the possibility of conflicting judgments—can be invoked in international cases, and whether a court in one state is bound to refuse to entertain an action on the ground that a suit on the same matter is pending in the courts of another state, in the same way as such a court would be bound to do if the other suit was before another court of the same state. The Court held that in this case it was clear that in any event the essential elements which constitute *litispendence* were not present. The actions were not identical: the action before the Mixed Arbitral Tribunal was a suit by a private company for the restitution of its factory, the suit between Poland and Germany before the Permanent Court of International Justice was one for the interpretation of certain articles in the Geneva Convention. The parties were not the same; and the Mixed Arbitral Tribunal and the Permanent Court of International Justice were not courts of the same character.

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[1] *Publications of the Court*, Series A, Nos. 20–21, p. 38.

[2] Judge Pessoa, dissenting, thought that the conduct of the parties must be accepted as conclusive evidence that the agreement was for payment in the form in which the Serbian Government had been paying all these years. The intention of the parties as evidenced by their conduct can override even clear words in the contract (pp. 66 *et seq.*).

[3] *Publications of the Court*, Series A, No. 6, pp. 19–20.

Costs. Article 64.

In no case up to date has the Court exercised its power under Article 64 to make any special order as to costs, and consequently each party has always paid its own costs.

THE INDIAN STATES

By D. B. SOMERVELL, K.C., Fellow of All Souls College, Oxford.

THE growth of British power in India is usually dated from Clive's victory at Plassey in 1757. In the half-century which followed up to 1813 British policy was on the whole against either further conquest and annexation or alliances. It was hoped that by war and diplomacy among the independent states themselves, large and efficiently governed Powers would emerge which would settle down as independent and friendly neighbours of the British. The policy was on the whole unsuccessful. In the south, conflict with the French, Haidar Ali and Tipu Sahib resulted both in conquest and alliances. In the centre of India however there remained in 1813 a large tract of independent territory outside the sphere of British influence and diplomatic action. It was chiefly the outbreak of war and anarchy in this territory that led to the adoption under Lord Hastings (1813–23) of the policy of binding all unannexed states to the Crown by alliances.

At the present day the Indian states comprise about two-fifths of the area and one-fifth of the population of India. Recent changes in the government of British India and further changes which are foreshadowed have brought into prominence the question of the exact relationship of the states to the British Crown. What are the rights and obligations on one side and the other, and in particular to what extent are the states sovereign ?[1]

The position of the states can in essentials be stated shortly and simply. First, their rulers have surrendered their powers of external sovereignty to the British Crown, while remaining internal sovereigns of their territories. Looked at therefore internationally from the outside by foreign Powers they are British. A foreign Power aggrieved by some act of an Indian state would complain to the British Crown. A foreign Power which committed an act of aggression against an Indian state would find that it had the British Crown to deal with.

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[1] My views on the relationship between the Indian states and the Crown are those set out in an opinion signed by Sir Leslie Scott, K.C., Mr. Stuart Bevan, K.C., Mr. Wilfrid Greene, K.C., Mr. Valentine Holmes and myself. This opinion was placed before the Indian States Committee by Sir Leslie Scott, K.C., who appeared on behalf of a large number of the states. The opinion is printed as an appendix to their report. The Committee dissented from some of the views expressed in that opinion but did not examine the legal position at any length. I have done my best to consider their criticisms, but they have not led me to alter my views as embodied in the opinion to which I have referred. I have tried to state fairly what are the points on which differences arise.

Looked at, however, from within, they are not British. Parliament, which has full legislative power over all British territory, cannot legislate for the Indian states. The states are not part of British India, nor are they governed by or subject to laws enacted by the Government of British India. They are subject to their own rulers and their own laws.

Secondly, the Crown, in addition to taking over the powers of external sovereignty, has undertaken to preserve the internal and external security of the states. The Crown would not only have the right but would be bound to defend a state against external aggression; it also has the right and is bound to step in if internal security is threatened by revolt or civil disturbance. The states in return for the pledge of security owe a duty of loyalty to the Crown.

There are in all some 562 states, ranging from Hyderabad with a population of over 12,000,000 down to minute holdings of a few acres. In what follows I deal with the general position of the more important states, about 230 in number and containing nearly 99 per cent. of the states' population.

The precise status of the Indian states and their relationship to the Crown is incapable of short or exact definition. Discussions on the subject are strewn with such words as quasi-international, semi-sovereign, suzerainty, feudatories, paramountcy, subordinate co-operation, and the like—words and phrases which of themselves would not illuminate a relationship admittedly *sui generis*, even if the words had in other contexts an exact meaning.

The relationship has its origin in alliances and treaties. Up to the beginning of the nineteenth century the alliances were for the most part as between equal and independent states. Then the Crown began to require, as a condition of alliance, that the states should surrender their rights of negotiation with foreign nations and with other states in alliance with the Crown. As time went on and the position of the British as the predominant power in India became established and patent, states dropped into alliance informally and without a treaty or written instrument defining the terms. The system as taken over by the Crown in 1858 from the British East India Company and as it exists to-day is aptly described by Lee Warner in the opening sentence of his book *The Native States of India* as a "network of alliances".

It is therefore in the alliances, formal or informal, and their provisions, express or implied, that the terms of the relationship are to be sought.

Two of the difficulties of the subject at once emerge. First, in order to determine the rights of any given state it is necessary to consider its individual history, its treaties or other formal documents, if such exist, and its other transactions with the Crown. Secondly, there has been a great deal of informality. Some states have no treaty, but have none the less plainly accepted the position of an Indian state, with the consequential privileges, obligations, and limitations of power. Rights and obligations *inter se* have been recognized by usage, the equivalent in inter-statal relations of a "course of business" in municipal contract law. The British policy of taking care for the problems of the day and leaving general principles to look after themselves has not smoothed the path of the lawyer in search of a formula.

Amidst all this diversity it is however possible to find certain general principles.

The Crown is recognized by the states as the Paramount Power in India. There are however differences of opinion as to the basis of this recognition and the rights of internal interference implied by it. As to its basis, the one view is that the relationship is based and solely based on agreement. If the Paramount Power has certain rights *vis-à-vis* the states it is because those rights have been ceded to it expressly by treaty or tacitly by conduct. The Crown has, for example, claimed and exercised a right to interfere in the internal affairs of *any* Indian state in the event of gross misgovernment. Treaty or no treaty, a state, by the very fact of being an Indian state and dealing with the Crown as such, has tacitly agreed to the exercise of such a right as against itself should occasion arise.

On the other view the basis is not "merely contractual" but "a living growing relationship shaped by circumstances and policy".[1] If this view is intended to imply that the Crown can increase its rights by a unilateral decision, there seem to be difficulties in reconciling this with the many solemn undertakings by the Crown to the states to "maintain unimpaired their privileges, rights, and dignities".[2]

Secondly, what are the rights implied by the recognition of the Crown as Paramount Power? It will be appreciated that in some cases these rights are formulated in a treaty, in some cases special rights may have been conferred by formal or informal agreement, but it is clear that apart from treaty certain rights and obligations flow from the recognition of the Crown as Paramount Power.

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[1] *Report of the Indian States Committee*, 1928–9, p. 23.

[2] Extract from King George V's Proclamation, 1919. Other similar undertakings are set out on pp. 73 and 74 of the *Report of the Indian States Committee*, 1928–9.

One view limits the implication to those which flow from the primary and admitted terms of the relationship, already referred to, covering foreign relations, and internal and external security.

The states have surrendered to the Crown their foreign relations, and the Crown has undertaken to defend them against aggression. The Crown, therefore, has all rights of intervention and interference necessary to carry out its obligations of defence; to do and secure what is necessary for strategical purposes.

The Crown has undertaken to protect the state and its ruler from internal as well as external dangers and to support the ruler and his lawful successors on the throne. The right, which has already been referred to, of intervention in the case of gross misgovernment, is a corollary of this undertaking. Gross misgovernment, maladministration, or reckless extravagance in expenditure are actual or potential dangers to internal security, and the Crown is necessarily entitled to step in and administer the remedy. The following two quotations illustrate the attitude of the British Government on the question of intervention.

The first quotation is from Lord Canning, writing in 1860. The "proposed measure" referred to was the assurance given to the states after the Mutiny that heirs by adoption would be recognized on failure of natural heirs. This assurance was given to remove the apprehension that a failure of natural heirs would be followed by annexation. Lord Canning is making it plain that this will not cut down the right of intervention in cases of misgovernment.

> "The proposed measure will not debar the Government of India from stepping in to set right such serious abuses in a native Government as may threaten any part of the country with anarchy or disturbance, nor from assuming temporary charge of a native state when there shall be sufficient reason to do so. This has long been the practice. We have frequently exercised the power with the assent, and sometimes at the desire of the chief authority in the state; and it is one which, used with good judgment and moderation, it is very desirable we should retain. . . . Neither will the assurance diminish our right to visit a state with the highest penalties, even confiscation, in the event of disloyalty or flagrant breach of engagement."

In 1875 the Gaekwar of Baroda was deposed for misrule. Prior to the deposition, the British Government appointed a commission to investigate complaints, and the following quotation is from the reply of the Viceroy to the Gaekwar's protest against the appointment of the commission.

> "Misrule on the part of a Government which is upheld by the British power is misrule in the responsibility for which the British Government becomes in a measure involved. It becomes therefore not only the right but the positive duty of the British Government to see that the administration of a state in such a condition is reformed, and that gross abuses are removed. It has never been the wish of the British Government to interfere in the details of the Baroda administration, nor is it my desire to do so now. The immediate responsibility for the government of the state rests, and must continue to rest, upon the Gaekwar for the time being. He has been acknowledged as the sovereign of Baroda, and he is responsible for exercising his sovereign powers with proper regard to his duties and obligations alike to the British Government and to his subjects. If these obligations be not fulfilled, if gross misgovernment be permitted, if substantial justice be not done to the subjects of the Baroda state, if life and property be not protected, or if the general welfare of the country and people be persistently neglected, the British Government will assuredly intervene in the manner which in its judgment may be best calculated to remove these evils and to secure good government. Such timely intervention, indeed, to prevent misgovernment culminating in the ruin of the state is no less an act of friendship to the Gaekwar himself than a duty to his subjects."

The right claimed and exercised by the Crown to settle cases of disputed succession and to ensure that there shall be efficient administration during a minority are similarly connected with and derivable from the obligation of preserving internal security and the throne of the ruler.

According to the view being considered, the rights of the Crown as Paramount Power to intervene in the internal affairs of the state are rights derivable from the Crown's responsibility for internal and external security and the maintenance of the ruler of the state. In any particular case it is for the Crown to decide in its own discretion whether intervention is necessary, but the question to be decided may be formulated in this way: "Is the contemplated act of intervention necessary for the purpose of exercising the rights or fulfilling the obligations of the Crown in connexion with foreign relations and external or internal security?"

If the answer is no, then the Crown has no justification for imposing its will by an act of intervention. It must resort to negotiation and obtain or seek the assent of the state to exercise its internal sovereignty to effect the result which the Crown desires.

The other view refuses so to limit Paramountcy, but is loath to attempt any definition.[1] A glance at a map of India, with the states spread like an archipelago from one end to the other, makes it plain that an intransigeant attitude on the part of the states would greatly hamper the economic development and the administration of the different divisions of the country. Non-strategic railways and telegraphs, postal arrangements, coinage, extradition of criminals, to mention a few subjects, depend, if the system is to be efficient, on the co-operation of the states with British India, and of British India with the states. It is in this financial, economic, and administrative sphere that the requests or demands of the Paramount Power most frequently impinge on state sovereignty. On the view put forward by the states, their internal sovereignty is in such matters unimpaired unless they have made a definite *ad hoc* cession by agreement. Their assent to exercise their internal sovereignty in the way desired must be sought and obtained. They could refuse to have a railway or to come into a postal or telegraph union or convention. The obtaining of their assent in such matters has been the normal procedure. It may be that the practical and mutual dependence of the states and British India on co-operation in matters of this kind accounts for the reluctance shown in the Report of the Committee to accept the view of Paramountcy put forward on behalf of the states. It may be felt that, if the system is to be maintained and to work, there must be some reserve of paramount power which the Crown could fall back on if the states refused to co-operate in matters which affected the economic or administrative interests of the country as a whole. In the writer's opinion there is no legal basis for such a reserve of power. The fact that attempts to formulate it have failed[1] lends some support to this view. It seems difficult to see how any such attempt, if made, could be consistent with phrases such as "the independence of the states in matters of internal administration" and "internal autonomy", which occur, for example, in the Montagu-Chelmsford Report.

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[1] *Report of the Indian States Committee*, 1928–9.

Nor is it perhaps a sound criticism of an inter-state relationship of this kind that it should depend for its working on mutual goodwill and co-operation over and above legal or binding obligations. It is, for example, obvious that the Crown in the exercise of its sovereign powers in British India could legally so act as to ruin the economic life of the states, which are for the most part lands surrounded either by other states or by British India. No one seeks to imply from this that the relationship involves as a legal incident the sacrifice of any sovereign rights by the Crown.

[1] *Report of the Indian States Committee*, 1928–9, p. 31.

No doubt such an implication appears to be more easily raised in the other direction, a sacrifice by the state to the Paramount Power, but it is difficult to see on principle what is its justification.

Some of the states feel strongly on these points, and at the moment disputed issues are in the foreground, but it would be wrong to leave the impression that controversy has been or is the predominant note in the relationship. The loyalty of the states to the Crown is difficult to exaggerate. From the days of the Mutiny to the Great War they have stood by the Crown and given their lives to the Empire to which they are proud to belong. The Crown has over and over again stated its gratitude and sense of obligation to the states and their rulers. The rulers are equally sensible of the debt they owe to the British Government which has preserved and maintained their existence as states. In internal matters the improvement in efficiency and administration is largely due to the encouragement, advice, and persuasion of successive Viceroys and political officers.

In 1921, as a result of a recommendation in the Montagu-Chelmsford Report, a Chamber of Princes was established. The decisions of the Chamber do not bind the Princes as a body or individually, but the existence of the Chamber and its standing Committee afford a real opportunity for consultation between the states, and for the debating of matters of common interest. It evidences the abandonment of the old policy of isolating the states from each other.

The future is full of problems. Under the present system the states complain that in disputes between themselves and British India, it is in effect the Government of British India which decides and is therefore in the position of both party and judge. The Committee in their report recognize that there is foundation for this complaint.[1]

An alteration in procedure could probably remove this grievance, but greater difficulties may arise if British India obtains a larger measure of, or full, self-government.

The states take the view, which is accepted by the Committee, that the obligations of the Crown to them should not without their consent be handed over to be dealt with by a Government in British India responsible to an Indian legislature.[2] So far as the Crown's obligation to preserve the external and internal security of the states is concerned there should be no great difficulty in the Crown retaining powers to carry out these obligations. This however would not be the end of the question. In, for example, fiscal matters the present Government of India, subject as it is to the control of the Secretary of State, has to consider the interests of the states as well as the interests of British India. The states and British India are so interlocked that the former will be certain to demand some safeguards for their interests if matters of this kind are handed over to the control of a responsible Indian legislature. These are no doubt among the matters which the Simon Commission are considering and will report on, and there is no reason to suppose that the difficulties they raise are insoluble.

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[1] *Ibid.*, p. 34.

[2] *Ibid.*, pp. 31, 32.

The problem of preserving local or state patriotism and institutions within an empire is one which has taxed the powers and ingenuity of statesmen. In the contribution which Englishmen have made to the solution of this problem they may well give a prominent place to the relationship which they have established and maintained with the Indian states.

THE OPTIONAL CLAUSE

(The British Signature and Reservations)

By SIR JOHN FISCHER WILLIAMS, C.B.E., K.C.

"*On behalf of His Majesty's Government in the United Kingdom and subject to ratification, I accept as compulsory* ipso facto *and without special convention, on condition of reciprocity, the jurisdiction of the Court in conformity with Article* 36, 2, *of the Statute of the Court, for a period of ten years and thereafter until such time as notice may be given to terminate the acceptance, over all disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to the said ratification, other than:*

> *Disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement: and*
>
> *Disputes with the Government of any other Member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree: and*
>
> *Disputes with regard to questions which by international law fall exclusively within the jurisdiction of the United Kingdom.*

And subject to the condition that His Majesty's Government reserve the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that notice to suspend is given after the dispute has been submitted to the Council and is given within ten days of the notification of the initiation of the proceedings in the Court, and provided also that such suspension shall be limited to a period of twelve months or such longer period as may be agreed by the parties to the dispute or determined by a decision of all the members of the Council other than the parties to the dispute.

The Optional Clause was also signed by the Dominions and by India. All these, with the exception of the Irish Free State, made Declarations identical in terms with that set out in the preceding paragraph. The Declaration made by the Irish Free State was as follows:

> *On behalf of the Irish Free State I declare that I accept as compulsory* ipso facto *and without special convention the jurisdiction of the Court in conformity with Article* 36 *of the Statute of the Permanent Court of International Justice for a period of twenty years and on the sole condition of reciprocity. This declaration is subject to ratification.*"[1]

The signature and ratification, by the Members of the British Commonwealth of Nations, of the "Optional Clause"[2] is a great event. Never before has this country accepted any such wide extension of the submission of its policy to the rule of law. Our acceptance of the Optional Clause, given after a long interval and not without long deliberation, is perhaps, it may be said without vanity, of greater importance than that of other nations—France, Germany, and Italy in particular—who have taken the same course; it was, in fact, notorious that British views of international law were not in agreement with those held in some other quarters on one point which, though it was a point of the law of war only, was, at any rate according to the older conception of international relationships, of capital importance. Changed conditions have now in the opinion of the British Government justified the submission in certain events to an international tribunal even of questions of international law relating to warfare at sea. Whether or not criticism of British action on this particular point be justified—and the political issues are not for discussion in this

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[1] Quoted from the Memorandum on the signature of His Majesty's Government in the United Kingdom of the Optional Clause of the Statute of the Permanent Court of International Justice. Misc. No. 12 (1929), Cmd. 3452, paragraphs 8 and 9.

[2] For the convenience of the reader it may be useful to give the text of Article 36 of the Statute of the Permanent Court of International Justice, acceptance of

paragraph 2 of which by "declaration" is usually called acceptance of the "Optional Clause".

Article 36.

"The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.

"The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

(*a*) the interpretation of a treaty;
(*b*) any question of international law;
(*c*) the existence of any fact which, if established, would constitute a breach of an international obligation;
(*d*) the nature or extent of the reparation to be made for the breach of an international obligation.

"The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

"In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

The expression "Optional Clause" seems to have originated in the official text of the Protocol of Signature of the Statute of the Court which contains after the section headed "A, Protocol of Signature", a second section headed "B, Optional Clause", in the following terms:

"The undersigned, being duly authorized thereto, further declare on behalf of their Government, that, from this date, they accept as compulsory *ipso facto* and without special convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, under the following conditions:"

It should be remarked that the paragraphs of Article 36 of the Statute are not numbered and it is not perfectly clear whether what is referred to as paragraph 2 in section B of the Protocol of Signature ends at the end of sub-paragraph (*d*) or includes the paragraph beginning "the declaration referred to", &c.

article—and whether or not the best forms of expression have been chosen, either in the framing of the "Optional Clause" itself or in the statement of the British reservations, the general acceptance of the Clause is a fact to which, if the nations act up to the obligations undertaken in their names, the term of a landmark in history will with no exaggeration be applied.

As appears from the statements reproduced at the head of this article, the Governments of the British Commonwealth (other than the Irish Free State Government), on their acceptance of the Clause, made, or appeared to make, seven conditions—"limitations", "reservations", or "exceptions" may be in some cases more appropriate terms:

(1) Their acceptance was "on condition of reciprocity";

(2) It applied only to "disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to the said ratification";

(3) It excluded disputes covered by some other method of peaceful settlement;

(4) It excluded disputes with other members of the British Commonwealth of Nations;

(5) It excluded disputes which by international law fall exclusively within the jurisdiction of the Government making the declaration;

(6) It made a stipulation for the suspension, at the request of the declaring Government, of proceedings before the Court when the dispute is under consideration by the Council of the League of Nations, but subject to certain provisions as to the duration of the suspension;

(7) It limited the acceptance of the jurisdiction to "a period of ten years and thereafter until such time as notice may be given to terminate the acceptance".

The British acceptance did not, however, and this is the feature which excited most public criticism or comment, make any exception in relation to maritime law in time of war.

Up to January 14, 1930, the states outside the British Commonwealth who had signed and ratified the Clause[1] were Abyssinia, Austria, Belgium, Brazil, Bulgaria, Denmark, Estonia, Finland, Germany, Greece, Haiti, Hungary, Lithuania, Netherlands, Norway, Panama, Portugal, Spain, Sweden, Switzerland, and Uruguay. The states outside the British Commonwealth who at that date had signed but not ratified were Costa Rica, Czechoslovakia, the Dominican Republic, France, Guatemala, Italy, Latvia, Liberia, Luxemburg, Nicaragua, Peru, Salvador and Siam.

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[1] See publications of the League of Nations. C.4. 1930. V. (14.1.1930).

All these acceptances, with the exception of those of Haiti and Nicaragua, were on condition of reciprocity. Brazil alone seems to have availed herself of the suggestion conveyed in the Optional Clause itself that the acceptance of one state might depend on the acceptance of "certain" states, and made her own acceptance conditional on the acceptance of the Clause by two at least of the permanent members of the Council of the League. Bulgaria, Haiti, Panama, Portugal, Uruguay, Costa Rica, the Dominican Republic, Guatemala, Liberia, Nicaragua, and Salvador accepted without limit of time. All other states fixed a period, either five years or some multiple of five years. Abyssinia, Belgium, Estonia, Germany, Greece, the Netherlands, Spain, Czechoslovakia, France, Italy, Latvia, Peru, and Siam excepted cases for which another mode of settlement is provided; the Netherlands drafted their exception on this head with special care, excluding only cases in which the reference to another mode of pacific settlement was posterior to the coming into force of the Statute of the Permanent Court, and so avoiding a possible ambiguity as to whether such an exception, if drafted in general terms, does or does not cover older treaties providing for a reference to the (so-called) Permanent Hague Court of Arbitration. Belgium, Germany, Spain, Czechoslovakia, France, Latvia, and Peru limited their acceptance to "facts or situations subsequent to ratification", the Netherlands to "future disputes", and Italy to disputes "arising after ratification". Greece—following in this her treaty with Yugoslavia[1] and with an obvious though unexpressed reference to Salonica—made the exception of "disputes relating to the territorial status of Greece, including disputes relating to its right of sovereignty over its ports and lines of communication".

No state, however, in accepting the Optional Clause, has revived the traditional exceptions which appear in pre-war arbitration treaties—honour, independence, vital interests or the rights or interests of third states.[2] The three former exceptions are indeed in obvious contradiction to the acceptance of any positive binding obligation to arbitrate, and the last exception—the rights or interests of third states—is not properly a limitation of the undertaking to submit to arbitration but rather a reminder that, as the rights of states not parties to a legal proceeding cannot be affected by its result, there may be cases in which an attempt to submit an international dispute to judicial settlement may be met by the objection that the "action is not properly constituted". Such a reminder has its usefulness. But its purpose is best served by the reasonable interpretation of any undertaking by a state to submit to judicial settlement—viz. that it can only refer to the rights or interests of the contracting party.

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[1] See the *Survey of International Affairs* for 1928. Oxford, 1929, p. 187.

[2] See, for example, the Franco-British Arbitration Treaty of 1903.

In what follows an effort is made to elucidate the scope of the British obligations. It may, however, be necessary to remind the reader at the outset that the "Optional Clause" has never yet been put into operation; there has never yet been an action brought in the Permanent Court against a signatory Power in which jurisdiction has been asserted, as a result of the Clause, by one party against the opposition of the other. Lawyers have therefore no positive basis of direct experience on which to establish their anticipations of the future—whether they be hopes or whether they be fears.

The Optional Clause.

Before examining the British reservations it will be convenient to glance at the scope of the Optional Clause itself.

Here the first thing that will strike the attentive reader is that neither the language of the Clause itself (Article 36 of the Statute) nor the language of the British acceptance justifies the view, commonly expressed in the Press and authorized both by the White Paper[1] and by the speech[2] of the Secretary of State for Foreign Affairs when introducing the motion for ratification in the House of Commons, that the Optional Clause either in itself or as accepted by the British Commonwealth of Nations confers jurisdiction upon the Permanent Court "in all international disputes which can be settled by means of law". The clause is not so expressed and it has not so comprehensive a pretension. It was introduced into the Statute of the Permanent Court from Article 13 of the Covenant of the League, which provides that "disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation or as to the extent and nature of the reparation to be made for any such breach, are declared to be *among those which are generally suitable for submission to arbitration*".[1] The framers and signatories of the Covenant clearly, therefore, did not consider that this list of disputes exhausted the category of those which were suitable for submission to legal process. The list avowedly included some, but not all, of the disputes thus suitable.[2]

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[1] Misc. No. 12 (1929), Cmd. 3452. The White Paper is perhaps not perfectly clear on this point. It quotes with approval (para. 11) the statement made at the time of signature that the Optional Clause gives the Permanent Court "jurisdiction over juridical disputes" but it also says (para. 6) that acceptance of the Clause means that "disputes falling within its terms" will be definitely settled by the Permanent Court.

[2] *The Times*, January 28, 1930. *Parliamentary Debates, House of Commons*, Vol. 234, No. 68, January 27, 1930.

Further, it is to be observed that when the formula was transplanted from the Covenant to the Statute the adjective "legal" was introduced; "all or any of the classes of *legal* disputes concerning", &c., is the language of the Statute. Has this adjective, on the true interpretation of Article 36 of the Statute, the effect of introducing an additional requirement—viz. that a dispute must not only concern one or more of the four classes of questions afterwards enumerated but also must be "legal", whatever may be the exact significance of the word in this connexion? Or is the word "legal" in substance otiose, is it, that is to say, a mere description of all the four classes of questions? It is enough here to note the existence of the point.[3]

Apart from this minor question as to the effect of the use of the word "legal", it is clear from an examination of the language of the second paragraph of Article 36 that the four categories of disputes there mentioned do not exhaust the disputes which might properly form the subject of legal decision. At the risk of repeating what the present writer has said elsewhere,[4] he ventures to insist on at any rate one striking instance of the inadequacy of the Clause. It contains no general obligation to submit a dispute as to facts to settlement by legal process. A question of fact is only "justiciable" under the Clause if the dispute concerns "the existence of any fact which, if established, would constitute the breach of an international obligation". Now international disputes may well grow out of facts which if established would not constitute such a breach. In the affair of the Russian Baltic Fleet and the British North Sea trawlers, which brought Russia and the British Empire very near to war, the fact in dispute was the presence of Japanese torpedo-boats among or near the trawlers. But the presence of those boats in war-time would not in itself have constituted a breach of any international obligation. Equally, on a boundary question, the facts of discovery and the continuous or discontinuous acts of occupation or authority which are in dispute may very well in some cases not constitute breaches of an international obligation; on such a question the only such breach[1] may be the actual or attempted possession at the date of the dispute—a fact the "existence" of which neither party challenges.

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[1] Italics the writer's.

[2] See *The Drafting of the Covenant* by D. Hunter Miller. Putnam, 1928, p. 327, from which it would appear that this was, in particular, President Wilson's view.

[3] Dr. Lauterpacht has kindly communicated to the writer the result of the researches which he has made in the minutes of the Committee of Jurists who drafted the Statute of the Court. The upshot of these researches (every reservation being made on the question whether the minutes are admissible as evidence for the true interpretation of Article 36—see p. 186 *post*) seems on the whole to be that the word "legal" may, in the opinion at any rate of all but one of the members of the Committee, be regarded as otiose. The sentence may be read as if it ran "all or any of the classes of legal disputes following, that is to say, disputes concerning", &c.

[4] See the writer's *Chapters on Current International Law and the League of Nations*, Longmans, London, 1929, pp. 36 and following.

Further, the formula of the Clause is open to criticism when it speaks of a fact "which, if established, would constitute a breach of an international obligation". In many cases will there be any general agreement that the fact, if established, would constitute such a breach? Will not in most cases the defendant state be in a position to say (1) "I dispute the facts laid to my charge", and (2) "Even if the facts did happen, I say that I was entitled to do what I did". Apparently in such a case the Permanent Court will have first to give judgment on an international demurrer, and only if it decides that the facts if established would give a good cause of action, proceed to an examination of the question of fact. But it was the practical inconvenience of procedure by demurrer that led to the abolition of a practice dear to our legal grandfathers in Westminster Hall; "*non differemus*".

The Clause, if it be intended to do what the Secretary of State for Foreign Affairs assumes that it does—to give, that is, an exhaustive list of disputes which, as between the disputants and with due regard to what is really at issue, can be solved by legal procedure—ought to have included *all* disputes as to facts.

The Court has ample power under its Statute to ascertain facts; it can hear oral evidence (Article 43) and it can appoint commissions of inquiry (Article 50). It would be regrettable if the well-justified action of the Council of the League of Nations in appointing commissions of inquiry—as in the Mosul case—should foster the illusion that disputes as to contemporary facts are necessarily within the province not of the Court but of the Council.

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[1] And this, only if the word "obligation" be interpreted as equivalent to "duty" and not as referring only to obligations arising under a treaty or other international contract.

This unsatisfactory reference to disputes as to facts is perhaps the most serious defect of the Clause; it is this defect which produces the limitation in the reference to treaties under sub-head (*a*) of the Clause. All that can be submitted to the Court under the Clause is the *interpretation* but not the *application* of a treaty. The Court under this sub-head of the Clause can be asked what the words of the treaty mean; it cannot be asked whether any particular fact or event, the character of which may be in dispute, does or does not fall within the language of the treaty.

The shortcoming of the Clause on this point may seem all the more curious when it is remembered that the pre-1914 precedents did not suggest so timid an approach. Thus, in this respect, the Bryan Peace Treaties were better than the Optional Clause; the Permanent Commissions under those treaties are restrained by no limit as to the facts which they may investigate. And the Hague Convention of 1907 for the Pacific Settlement of International Disputes, though it excluded—as was then the fashion—disputes involving honour or vital interests from the scope of the Commissions of Inquiry which it recommended, suggested no special limit as to the facts to be elucidated "by means of an impartial and conscientious investigation" (Article 9 of that Convention).

The Clause has other shortcomings—but they are perhaps of language rather than of substance. Thus the categories of the Clause are not mutually exclusive. The expression "any question of international law" seems to cover,[1] at any rate according to Anglo-Saxon ideas, questions of interpretation of treaties and of the nature or extent of reparations to be made for a breach of an international obligation. It may, however, have been practically useful to make a separate category of a subject so important as that of the interpretation of treaty obligations; it is to be remarked that in so doing the draftsmen must be supposed to have intended to cover by the word "treaty" every kind of written international engagement, even though in Article 18 of the Covenant the word "treaty" is used in a less comprehensive sense.

To discuss the question of the best definition of "justiciable" disputes would be to stray beyond the proper limits of this article, but it may be permitted to call attention here to the formula of Locarno, adopted at Geneva in September 1928 in the model draft treaties for pacific settlement—"questions in regard to which the parties are in conflict *as to their respective rights*", and to suggest that this definition is preferable to the formula of the Optional Clause. It would doubtless have been difficult, if not politically impossible, for a Government desirous of accepting the Clause to have imported a new definition of the justiciable dispute, sought outside the Clause, whether from Locarno or elsewhere. The Clause is now an institution, and we must make the best of it. Would it, however, have been impossible to have accepted the language of the Clause, and to have then intimated a willingness to go beyond it, attaching always whatever reservations were thought desirable?

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[1] We say "seems to cover"; there is also the possibility of a restricted interpretation according to which only questions of pure law and of an abstract character—e.g. whether in international law a third party can enforce a treaty made in his absence for his benefit in circumstances excluding the hypothesis of agency—fall under this head.

The truth is that, from the point of view of those who desire to see the widest extension possible of the principle of judicial settlement consistent with the avoidance of the permanent stereotyping of the *status quo*, the formula of the Optional Clause has always been a little unfortunate in its setting. The Clause, where it appears in the Statute, seems to announce itself as stating a maximum of categories of disputes which may conceivably be accepted as justiciable, a limit, that is, of which states may very well fall short (for they are invited, if they are so inclined, to accept some only of the categories) but beyond which they can hardly be expected to go. The formula of acceptance—the B formula of the Statute[1]—suggests exceptions and reservations, but not expansion. Such circumstances do not favour drastic action by a state anxious to give an example to the world.

In these conditions it is not surprising that the Governments of the British Commonwealth (other than the Irish Free State Government), following in this the example of other states, have attached to their acceptances conditions, rather than expanded the scope of the Clause.

THE BRITISH CONDITIONS.

To come now to the conditions of the Governments of the British Commonwealth: first, let it be said by way of premiss that it would seem hardly to be doubtful that, as a matter of general principle, a state may make what conditions it pleases on acceptance of the "Optional Clause" and is not limited by the suggestions as to conditions which may be discovered in Article 36 itself. A state is free to accept or not to accept the obligations of the Clause. In the absence of express words, the liberty not to accept covers the liberty to place conditions on acceptance. The fact that the only condition mentioned in the Clause is "reciprocity on the part of several or certain Members or States" does not imply that any other condition is in relation to the other signatories of the Statute inadmissible. This interpretation seems in fact to have commended itself to other accepting states as well as to the British Governments; conditions accompanying acceptance have been nearly as numerous as the acceptances themselves.

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[1] See note on p. 64 above.

The White Paper (paragraph 5) says that "the terms of Article 36 have been regarded as admitting the making of a reserve or exception of any kind . . . because the jurisdiction of the Court may be accepted '*in all or any*' of the classes of legal disputes enumerated". But it may be doubted whether this is the only justification for the admission of reserves and exceptions. It is indeed a commonplace of all recent discussions of this subject that states are to be at liberty to make exceptions, usually styled "reserves", to general arbitration treaties; thus, for example, M. Holsti, in his memorandum of February 1929 to the League Committee on Arbitration and Security,[1] groups such reserves as generally falling under the four heads—vital interests, territorial status, domestic legislation, and facts earlier in date.

"*On condition of reciprocity.*"

There appears to have been some uncertainty at Geneva in September 1929 on the point whether these words should or should not be accompanied in the acceptance by the words "in relation to any other Member or State accepting the same obligation". Czechoslovakia, Latvia, and Siam all treated the words "on condition of reciprocity", when introduced into their formulae of acceptance, as interpretative of the expression "in relation to any other Member or State accepting the same obligation". France, Italy, and Peru inserted in their formulae of acceptance the words "in relation to any other Member or State accepting the same obligation" without adding any such words as "on condition of reciprocity". Greece adopted the same form as the British Governments; that is to say, it used the expression "on condition of reciprocity" without using the words "in relation to any other Member or State accepting the same obligation".

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[1] *League of Nations,* IX; *Disarmament, 1928,* IX, 3.

These variations are, it is suggested, matters of pure form; it seems, that is to say, to the writer that those states which have interpreted the two expressions as having the same meaning when used in the formula of acceptance are justified in the course which they have taken. On the other hand, it seems probable that on the true construction of Article 36 of the Statute the reference there to "on condition of reciprocity" meant something different from "in relation to any other Member or State accepting the same obligation". This latter phrase occurs, as will have been seen, in the first sentence of the second paragraph of Article 36 where it seems to be assumed—and this indeed is the common sense of the matter—that no state will bind itself except to other states which are willing to accept a similar obligation; the expression "condition of reciprocity" occurs in a separate part of Article 36 where an option is given to a state accepting the Clause to make the declaration either "unconditionally or on condition of reciprocity on the part of several or certain Members or States". In this passage, however, the phrase "on condition of reciprocity" seems not to refer to the general assumption that a state will only be bound in relation to other states which are similarly bound, but to the possibility that a state in accepting the Clause will make its acceptance conditional upon some other state or states—named or described—doing the same thing. Thus, for example, a Member of the League might quite well make its acceptance of the Clause conditional on one or more of the members of the Council also accepting it, and this was the form of acceptance actually used by Brazil.[1]

Leaving this question behind us, can we say that the words "on condition of reciprocity" mean that a declaring Government is bound only in relation to such Governments as have made *exactly* the same declaration, reserves and all? This question must surely be answered in the negative, if only for the reason that an affirmative answer would deprive the declaration of the British Governments of any meaning unless and until some other Government makes an exactly similar declaration—an event which has not yet happened and is not likely to happen in the future.

It would seem reasonable to hold that, while a state which gives a wider acceptance than another accepting state is not bound to that other state in respect of matters included in its own acceptance but excluded from the acceptance of the other state, still the two states are mutually bound in respect of matters falling within the acceptance of both of them. Incidentally, on this interpretation no practical value would seem to attach to the fact that the declaration of the Irish Free State does not exclude from the operation of the Clause disputes with other Members of the British Commonwealth. Such disputes being excluded from the declaration of the other members, there is between them and the Irish Free State no reciprocity as to such disputes.

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[1] See p. 66, *supra*.

The limitation to future disputes.

More important is the limitation of the acceptance of the Clause to "disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to the said ratification". The White Paper, repeating the statement made at the time of signature at Geneva, merely says (paragraph 11) that "the declaration . . . covers only disputes which may arise in the future", and Mr. Henderson in the House of Commons said exactly the same thing. These expressions might lead to the erroneous conclusion that *all* future disputes are thus covered. This is not so. Not all disputes that arise in the future are covered, as is the case in the Italian acceptance in 1929 and the earlier acceptance of the Netherlands, but only future disputes of a certain class—only such as relate to "situations or facts subsequent to" the ratification of the adhesion to the Clause.[1] The expression "a fact subsequent to" a given date is tolerably clear and should give the Permanent Court, if and when it has to interpret it, little trouble. But what is a "situation" subsequent to a given date? Or rather what in this connexion is "a situation"? Obviously, it is something different from "facts". Can it mean only a set of "facts" considered in their mutual relations? If a state is in occupation of contested territory at the date of the ratification and continues in occupation afterwards, is this a situation "subsequent", as well as prior, to ratification? In other words, is the conception of the "continuing cause of action" admitted? If, again, the question in dispute relates to the interpretation or application, in the light of events subsequent to ratification, of a treaty earlier in date than ratification, is the whole matter then "a situation subsequent to the said ratification"? If, to take a concrete if unlikely case, the Permanent Court, acting under the terms agreed between Germany and her creditors at The Hague in January last, were to find that the Young Plan had been destroyed, would the question whether or not the rights of the Creditor Powers under the Treaty of Versailles revived, or survived, in relation to Germany, be comprised within the British acceptance? It is enough to indicate the possibility of such questions.

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[1] See above, p. 66, for the forms used in this connexion by other states. The form used by the British Government is to be found in the earlier acceptances of Belgium, Germany, and Spain. It would be interesting to know exactly how this language originated; it certainly is of highly respectable parentage, but was its father a diplomat or a lawyer?

That *some* limitation of the British acceptance by the exclusion of past controversies was both necessary and desirable, is obvious. In the absence of any generally recognized period of limitation for international claims, it would be imprudent—and incidentally no service to the cause of peace—to open the door to the legal discussion of all past controversies. In particular it will probably be the general desire not to disinter controversies as to events, already past, connected with the World War. For this purpose the Locarno formula has a claim for consideration: "This provision (for legal settlement) does not apply to disputes arising out of events prior to the present convention and belonging to the past." A dispute could not be said to "belong to the past" if it related to the sovereignty over territory still in the occupation of one of the disputant Parties even though the original event out of which the dispute arose—i.e. the taking of possession—was prior in date to the ratification.

Other methods of peaceful settlement. Inter-Commonwealth disputes. The limitation as to time.

Space does not allow us to discuss at any length the reservations of (1) disputes covered by some other method of peaceful settlement; and (2) disputes with other Members of the British Commonwealth of Nations; nor (3) the limitation of the acceptance to ten years and thereafter until notice of termination.

On these points it may be enough to suggest that (1) the exception of disputes covered by another method of peaceful settlement applies to such disputes as those arising under the recent reparation settlement at The Hague, for which a special tribunal is provided, and that the expression peaceful *settlement* implies that the "other method" is one leading to a final result; (2) disputes between Members of the British Commonwealth are on a different footing from disputes of a British Government with a foreign state; (3) it must be supposed that no British Government after the end of the ten years would suddenly terminate its acceptance of the Clause when threatened by an unwelcome reference to the Court.

Jurisdiction of the accepting Government.

The exclusion of disputes which by international law fall exclusively within the jurisdiction of the United Kingdom (or as the case may be) is of special interest in connexion with the question of maritime law discussed later; in so far as this exclusion merely makes it clear that the acceptance does not enlarge here and now the jurisdiction of the Court, it is of interest to the statesman rather than the lawyer, though it may be considered to be a prudent precaution not alien to the genius of the country where the conveyancer has his home. It will not be forgotten in this connexion that the last paragraph of Article 36 gives the Permanent Court authority to decide any dispute as to whether it has jurisdiction. The general question of matters of "domestic" jurisdiction is not for discussion here.[1]

The reference of a dispute to the Council of the League.

The reservation of the right to suspend proceedings before the Court in view of a reference to the Council of the League is of more immediate importance. The White Paper (paragraph 11) and Mr. Henderson agree in saying that some of the disputes covered by the Optional Clause "are really political in character though juridical in appearance"; for this reason the British Government requires that disputes covered by the Clause may be referred at its own choice to the Council of the League before they are dealt with by the Court. This is an admission that the categories of disputes contained in the Optional Clause, which, as we have seen, do not exhaust the list of "legal" disputes, do not fall wholly within the limits of such a list. But it is also something more.

In truth from the point of view of the student of the general principles of international law, this reservation is of all the British conditions the most significant and the most important. It involves tacitly a radical criticism of the methods of the Optional Clause and of the assumption on which most of the discussions relating to it, including perhaps part of what precedes, have been based—the assumption, that is, that in present conditions international "disputes" can be classified by the objective and external test of examining their subject matter, as if they were so many museum specimens which a scientist can put under the microscope. Such an assumption is untrue. A dispute is a particular kind of relationship between two or more minds. If the minds are those of individuals, the disputants are compelled, if they mean to have the dispute settled in a fashion that will bind, to put themselves in one form or another in submission to law in relation to the dispute. The disputants cannot, if they are law-abiding, seek to settle the dispute by a breach of the peace. And the law can settle authoritatively, according to the subject-matter of the dispute, what tribunal is to have jurisdiction. But if the minds concerned are the minds of the rulers of states, their conception of the relation of their dispute to law is all-important; they are not compelled, as things stand, to seek a binding settlement by law only, even though it be true, as the present writer believes, that international law can provide a solution, though not necessarily the best solution, for any international dispute when stated objectively. The disputants, or one of them, may be prepared to say that they will not accept a legal decision.[1] And, therefore, the question about an international dispute which is most important for the international lawyer is not, what is the subject-matter—e.g. whether it relates to the interpretation of a treaty or to the determination of a boundary—but whether either (1) the disputants are in agreement that what they are seeking are their respective "rights" according to a legal system, or (2) some or all the disputants are unwilling to accept a legal decision and are asking for a change in the law. It is true that in most, or nearly all, cases, when the subject-matter of an international dispute is of a certain kind—e.g. what ought to be done in relation to matters dealt with by a recent treaty—it might be supposed that the disputants would be seeking, or at any rate would be unwilling to admit that they are not seeking, the rights given them by a system of law conceived as fixed and as existing; it might be thought that the responsibility of taking up any other position would be very great and the strongest government might well shrink from it.

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[1] See Professor Brierly on "Matters of Domestic Jurisdiction", *British Year Book*, VI (1925), pp. 8–19.

But at our present stage of development governments in acute controversies where they consider that vital interests are at stake sometimes reveal themselves as in fact unwilling to accept a legal settlement of what, if the subject-matter alone be regarded, is a "legal" or "justiciable" dispute. In the affair of the Optants, Roumania insisted that it involved the whole of her social economy,[1] and that it must be settled on a political rather than a juridical basis. Czechoslovakia by the mouth of M. Beneš took the same view. And yet most lawyers would agree with M. Adatci's[2] view that the essential point at issue appeared to be the interpretation of a treaty which might be referred to the Permanent Court of International Justice. In truth the interpretation of a treaty only *appeared* to be the essential point at issue. Fundamentally the Roumanian position (and we are not seeking here to criticize, but only to interpret it) was that if the Treaty of Trianon on its true interpretation produced a certain result, that result was inacceptable; if such was the law, the law was unjust, and Roumania asked for the international equivalent of remedial legislation. If the occasion be sufficiently grave, this is a position which must be admissible—though when international society has become really law-abiding it will only be rarely taken up. When once that condition is realized, the whole force of the opinion of international society—and possibly its material force in one shape or another—will be hostile to an attempt, except for the very gravest reasons, to depart from legal obligations.

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[1] "No United States administration has as yet shown a willingness to arbitrate any feature of Caribbean policy, whether in interpretation of a treaty or otherwise." *Survey of American Foreign Relations*, 1929, p. 68. (New Haven: Yale University Press.)

If that condition is not yet realized, one cause is doubtless that we are not yet habituated to see the machinery of international law at work and that the superstition of its incompetence—which is not the same thing as its primitive stage of development—is still widespread.

To come back now from these general observations to the British "reservation" which was their origin: the reservation in itself contains no definition of the disputes that may be so referred to the Council; the British Government remains free to say that it considers any particular dispute "really political in character"; this freedom is the assertion of the essential subjectivity of a "dispute". In any particular case, even of the interpretation of a treaty, the British Government can say that it is not disposed to accept, and therefore is not seeking, a legal interpretation but is asking for a modification of the legal rights—whether by way of extension of its own rights or of diminution of its own duties or by some method of compromise. And so we come back to the Locarno formula: the dispute in such a case is not as to "rights" in the lawyer's sense—i.e. the existing rights in the actual legal situation—but on the British side is a demand for a modification of rights, a demand, that is, in the international sphere for what in the domestic sphere would be new legislation.

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[1] *Survey of International Affairs*, 1928. Oxford University Press, 1929, p. 178. It is significant, however, that Roumania has not up to now signed the Optional Clause.

[2] *Ibid.*, p. 171.

On the other hand, it is by no means certain that a reference to the Council would prevent a dispute being dealt with on its legal merits if the Council, or some member of it, took the view that the dispute was, in spite of the attitude of the British Government, properly to be settled in accordance with law. It might be open to the Council to request the Permanent Court for an advisory opinion, though whether this could be done against the will of one of the parties to the dispute is open to doubt; even if this course were not, or could not, be taken, the fact that it was strongly favoured by any one member of the Council would prevent the Council settling the matter (which it can only do by consent) within twelve months, and if the Council is so prevented, then, unless the suspension is extended by a decision in which all members of the Council other than the disputants unanimously concur, the matter goes forward before the Court. Practically, therefore, there is always a possibility, if not a probability, that the reserve will be ineffective and the dispute be settled, in despite of what would be the view of the British Government, by law. Is there then much practical value in this reservation? If A and B have a dispute and A believes that he is right in law, B will not as a rule succeed in protecting himself from legal proceedings by merely stipulating that A is not to issue his writ until he has tried for a year to get B to accept something different from, and presumably less acceptable than, his legal rights. It is no doubt true to say with the White Paper (paragraph 11) that "this formula places the United Kingdom in much the same position as a state which has agreed to a treaty of arbitration and conciliation providing for the reference of all disputes to a conciliation commission before they are submitted to a judicial settlement". But such a state is not in a strong position for avoiding a legal settlement—apart from the fact that in practice it would be a serious step for a government to declare that it is not disposed to accept a legal settlement of a dispute which according to its subject-matter is within the Optional Clause. A change of international rights must not be asked for without the most weighty reasons if a general respect for those rights is to be preserved. But if a change of international rights is to be asked for, it would be better that the demand should be effective.

In truth the fault of the reservation is that while it seems to recognize the distinction between the dispute as to rights and the dispute in which one party at least challenges the existing order, it fails to draw the full conclusions from this recognition. If one party to a dispute is unwilling to accept a settlement on the basis of legal right and if it is intended to respect this unwillingness, he ought not to be obliged, after not obtaining within twelve months (a very short period in international relations) a recognition of the reasonableness of his challenge, to withdraw it and to submit the matter to law. On this point the Government of the United Kingdom in 1928, in their observations on the programme of the Arbitration and Security Committee of the Preparatory Commission for the Disarmament Conference,[1] were justified in saying (paragraph 21) that treaties were not to be recommended which provided that if the parties did not accept the recommendations of a conciliation committee, the dispute should be submitted to the Permanent Court.

Maritime Law of War.

This question is of such importance and also demands for its adequate treatment so full a knowledge of past controversies, that the present writer would have wished to see it treated by a pen of acknowledged authority. He will, therefore, as a lawyer who cannot claim any special competence on these matters, confine himself to attempting to state briefly what he understands to be the position resulting in this matter from the acceptance of the Optional Clause.

It is clear that questions of Prize Law, in so far as they may arise in the future, are not excluded from the operation of the Clause. The White Paper (paragraph 25) is definite on this point, and in any case it is impossible to maintain that Prize Law is a matter which "by international law falls exclusively within the jurisdiction of the United Kingdom".[2] A British Prize Court administers international law; if a British statute were passed ordering it to conform to rules not in accordance with international law, the Statute, though effective in compelling the obedience of the Prize Court (whether Lord Stowell or Lord Parker would have resigned judicial office is another question), would not have the effect of making judgments given in consequence of the statute valid in international law as against the foreign state or foreign nationals affected.

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[1] See Publications of the League. *C.A.S.* 10. IX; *Disarmament, 1928*, IX. 3.

[2] See the convincing argument of Professor Pearce Higgins in his pamphlet, *British Acceptance of Compulsory Arbitration, &c.* Heffer & Sons, Cambridge, 1929.

The position as to Prize Law is not what it was before the Covenant of the League. If the British Government is engaged, on the recommendation of the Council of the League, in measures taken under Article 16 of the Covenant against a Member of the League which has, or is alleged to have, "resorted to war" in violation of the Covenant, no Member of the League which takes the same view as the Council as to the action of the state affected can complain of interference with its own commerce in the course of the economic pressure applied to the offending state. But it would seem that Members of the League are at liberty to form their own opinion as to whether the state against which measures are taken under Article 16 has or has not "resorted to war in disregard of its covenants";[1] any such Members who do not accept the view of the Council, could, if they have themselves accepted the Optional Clause, challenge under it British action interfering with their commerce. It is, however, true that any Member of the League making such a challenge will have to argue before the Permanent Court that the Council of the League was wrong in holding that the state against which action is being taken by the British navy has "resorted to war in disregard of its covenants", and it is, therefore, unlikely that the challenge will succeed. We thus may feel a reasonable confidence that the statement in the White Paper[2] that "as between Members of the League there can be no neutral rights, because there can be no neutrals", is likely in practice to be justified—if need for justification arises—by the event. The statement, it is hardly necessary to insist, is, with perfect accuracy, limited to Members of the League.

If on the other hand the British Government is engaged in a war otherwise than in pursuance of Article 16 of the Covenant, this limitation of the rights of Members of the League will not apply. In such a case a Power signatory of the Optional Clause, whether a Member of the League or not, will be entitled to insist that the legitimacy of measures directed against sea-borne commerce be submitted to the Permanent Court.

The politically all-important question of the attitude of the United States would seem in existing conditions to be irrelevant to the question of the legal effect of the acceptance of the Optional

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[1] The fourth of the resolutions of the Assembly of the League in 1921 was to the effect that it was for the Members of the League severally to decide whether there has been a violation of the Covenant. "This doctrine", said M. Rutgers in his classical report in 1928 to the League Commission on Arbitration and Security (*League Publications*, IX, *Disarmament, 1928*, IX. 3, p. 33) "is generally accepted to-day".

[2] Paragraph 21, at the end.

Clause. The United States is not a Member of the League nor a signatory of the Optional Clause. The signature of the Clause by the British Governments is a political gesture of great importance, but legally it leaves questions of maritime law in time of war as between the United States and ourselves exactly where they were in 1914. The Clause, like the Covenant, is effective only as between the states which sign and ratify it. The position would, of course, be altered if the United States became a signatory of the Clause.

The Pact of Paris has a bearing on this question only in so far as, for its signatories, it may prevent a resort to war and in particular may have the effect, for those signatories who are also Members of the League, of closing the so-called "gap in the Covenant", i.e. of preventing a resort to war under Article 15 (7) by which in certain events "the right to take such action as [Members of the League] shall consider necessary for the maintenance of right and justice" is reserved. The Pact thus diminishes the chances of war and therefore occasions for applying wartime maritime law; but it does not directly affect the legal question of the legitimacy of certain measures.

The power to exclude from the Permanent Court, for a time at any rate, questions "really political"[1] would allow a British Government to endeavour to deal with a question of Prize Law through the Council and not through the Court. But the endeavour is unlikely to be successful, especially if the opponent anticipates that the Permanent Court would decide in his favour.

It is hardly necessary to state that Great Britain, in any future war in which she is not engaged, will be entitled, as against a state which has itself accepted the Optional Clause, to bring before the Permanent Court the question of any interference with her own commerce, in the same way as any other Member of the League.

Questions of wartime maritime law, and indeed the whole conception of neutrality, will need further examination should there be an attempt to negotiate such a general convention supplementary to the Peace Pact, and perhaps also to the Covenant, as is suggested by General Smuts.[2] Such a general convention could give precision and form to the distinction between "Private War" and "Public War" or "Police Operations" in the international sense, a distinction which cannot as yet be said to have become part of positive international law for the whole civilized world.

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[1] See p. 76 above.

[2] *Africa and some World Problems.* Clarendon Press, Oxford, 1930, p. 133.

And, lastly, let it be emphasized again that we are here dealing with a point in the Law of War.

What is the conclusion of the whole matter?

Acceptance of the Optional Clause is the practical step by which at the present time a Government can best show its willingness to accept legal decisions for international controversies when such decisions are appropriate. Such acceptance is not given lightly by a British government, and it involves for a British government more difficulty than for any other government in the world. The Clause is not perfect in its expression, the conditions in which international agreements are ordinarily negotiated making it difficult, if not impossible, to attain perfection in draftsmanship; but, even apart from questions of drafting, the Clause does not cover all the cases to which it might reasonably extend and is based on the faulty principle of an objective definition of the "justiciable" dispute. Nearly all the other Powers which have accepted the Clause have attached "reserves" to their acceptances; the British governments have, not without justification, followed the general example, and in some cases even the phraseology, of these reserves. Now that the Clause has been accepted, the next step would seem to be the reconsideration, in the light of the Covenant and of the Pact of Paris and with the Powers who have signed those instruments, of the whole conception of neutrality.[1] This will be a more difficult and a far more lengthy piece of work than the acceptance of the Optional Clause, but for the British Commonwealth of Nations, in view of maritime possibilities which cannot be excluded on a prudent view of the future, the task is rendered more than ever indispensable by the momentous act to which the House of Commons has given approval.

Finally, it may be remarked that the story of the Optional Clause would seem to have been written for our learning in connexion with the subject of codification. If the view taken above be correct, if, that is to say, in the year 1920 jurists of the highest distinction produced, and all the Members of the League accepted, a formula which was generally supposed to supply a description of international disputes proper for submission to legal decision, and yet this same formula only a few years later was supplanted both at Locarno and at Geneva (in the model treaties of pacific settlement) by another and very different set of words, the necessity for extreme caution in the fixing of an "international code" would seem to be inexorably, if not brutally, insisted upon by events. If in 1920 a code with a definition of "legal" disputes on the lines of the Optional Clause had been drafted and accepted, the settlement of international differences on reasonable lines of classification without resort to force would, in comparison with what has actually happened, have been not advanced but retarded. "Optional Clauses" are, as their name shows, adaptable things; codes are more intractable, for an imperfection in a code may not be curable within the life of a generation.

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[1] The French memorandum to the Naval Conference of London contains a suggestion for an understanding "defining the rights of belligerents and the rights of neutrals and providing for the prospective co-operation of other fleets against that of an aggressor country".

THE INTERNATIONAL COURT: AMERICAN PARTICIPATION; STATUTE REVISION

By ALEXANDER P. FACHIRI

THERE were signed at Geneva on September 14, 1929, two documents of great importance in the history of the Permanent Court of International Justice, namely, the Protocol of Accession of the United States and the Protocol for the Revision of the Court's Statute. Although the two instruments are independent, it is convenient to discuss them together, both by reason of their coincidence in time and of a certain relationship between them.

Protocol of Accession.

The negotiations for American accession date back to 1926 when the Senate of the United States, after three years of public controversy, finally adopted by 77 votes to 16 the resolution "advising and consenting" to participation in the Court, subject to five reservations. As is well known, the attempts made by the states that were already parties to the Court's Statute to reach a *modus vivendi* which, whilst satisfying the Senate's conditions, would also safeguard the efficient operation of the Court, were unsuccessful, and no further progress was made until the early part of 1929 when President Coolidge instructed his Secretary of State, Mr. Kellogg, to address a note to the signatory states and the Secretary-General of the League, suggesting an informal exchange of views for the purpose of arriving at an "agreement upon some provision which, in unobjectionable form, would protect the rights and interests of the United States as an adherent to the Court Statute".

Whether by design or happy chance, this note coincided with the action taken by the Council of the League in connexion with the Statute revision question. A committee of jurists[1] had been appointed to meet at Geneva in March to report on this subject; Mr. Elihu Root was a member and he was at Geneva when Mr. Kellogg's note of February 19 was received and discussed at the session of the Council then being held. It was, therefore, a natural step for the Council to request the committee of jurists, in addition to their other task, to consider the present situation as regards

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[1] This committee consisted of MM. Scialoja (chairman), Van Eysinga (vice-chairman), Fromageot, Gaus, Sir Cecil Hurst, Ito, Pilotti, Politis, Raestad, Root, Rundstein, and Urrutia.

American accession and to make suggestions with a view to facilitating such accession on conditions satisfactory to all the interests concerned. The result was a draft Protocol[1] unanimously adopted by the committee on March 18, 1929, together with an explanatory report[2] drawn up by Sir Cecil Hurst.

This draft Protocol was considered and adopted by the Council of the League at its Madrid session on June 12, 1929. It was then submitted to the conference of states parties to the Court's Statute, which had been convened at Geneva in September to deal with the proposed amendment of the Statute, and unanimously adopted by the delegates of the Powers there represented, after an intimation had been received from the American Secretary of State that he considered that the draft Protocol "would effectively meet the objections represented in the reservations of the United States and would constitute a satisfactory basis for the adherence of the United States". On September 14 the Protocol was unanimously approved by the Assembly of the League and it was subsequently signed, exactly as drafted by the committee of jurists, by forty-nine states, including all those adherent to the Court.[3] The signature of the United States was affixed on December 9.

Before considering the contents of this document it may be well to recall the nature of the reservations which were the cause of previous difficulties, now, it may be hoped, successfully overcome. The five reservations were, broadly speaking, designed to secure for the United States what the Senate conceived to be equality in relation to the Court with the other Great Powers, permanent members of the Council of the League, whilst at the same time preserving the United States from any "entanglement" with the League of Nations.

The first reservation was as follows: "That such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the Treaty of Versailles". This never gave rise to any difficulty. Inasmuch as the Statute of the Court was brought into force by a direct and separate international agreement, it is quite plain that American adherence to the Court would not involve any such consequence as is referred to, and it was, therefore, unnecessary to make any special provision to meet this point. The Protocol of Accession, however, states expressly, in its preamble, that the signatory states "have mutually agreed to the following provisions regarding the adherence of the United States of America . . . subject to the five reservations formulated by the United States in the resolution adopted by the Senate on January 27, 1926", and in Article 1, that the parties "accept the special conditions attached by the United States in the five reservations mentioned above to its adherence . . . upon the terms and conditions set out in the following articles". Inasmuch as no terms or conditions are mentioned in regard to the first reservation it is purely and simply accepted.

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[1] *League of Nations Document* C. 293, M. 157, 1929 V. This, together with the other relevant documents, is reproduced in a World Peace Foundation pamphlet *The United States and the World Court* by Professor P. C. Jessup, which contains a detailed and most able account of both subjects dealt with in this article.

[2] *League of Nations Document* C. 142, M. 52, V. 4.

[3] The Protocol as signed is published as a White Paper, *Cmd.* 3428 of 1929.

Second reservation: "That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other states, members, respectively, of the Council and Assembly of the League of Nations, in any and all proceedings of either the Council or the Assembly for the election of judges or deputy-judges of the Permanent Court of International Justice or for the filling of vacancies." Article 2 of the Protocol incorporates this provision, practically word for word, with the addendum (to make assurance doubly sure) that "the vote of the United States shall be counted in determining the absolute majority of votes required by the Statute".

Third reservation: "That the United States will pay a fair share of the expenses of the Court as determined and appropriated from time to time by the Congress of the United States." This involves no amendment of the Statute, and accordingly it falls under the general acceptance of the reservations alluded to above, without further provision being necessary in the Protocol. Under Article 33 of the Statute the expenses of the Court are borne by the League as decided by the Assembly. The contribution of the United States will be left to the unfettered discretion of Congress, and the necessary adjustments in the shares of the other contributors can easily be made.

Fourth reservation: "That the United States may at any time withdraw its adherence to the said Protocol [i.e. the Protocol of Signature of the Statute] and that the Statute . . . shall not be amended without the consent of the United States." The first part of this reservation touches an eventuality not contemplated by the Statute, which makes no provision for withdrawal. The Protocol of Accession gives effect to the condition laid down by providing that the United States may at any time withdraw its adherence to the Protocol of Signature of the Statute whereupon the Protocol of Accession shall cease to be in force. As, however, the principle of reciprocity obviously calls for some corresponding right on the part of the other parties, it is laid down that each of the other contracting states may at any time give notice that it desires to withdraw its acceptance of the special conditions attached by the United States to its adherence and that the Protocol of Accession shall cease to be in force if and when within one year of this notification not less than two-thirds of the contracting states, other than the United States, give notice that they desire to withdraw their acceptance.

The second part of the Fourth Reservation really goes without saying, since it is unquestionable that the consent of all parties is necessary for the amendment of an international agreement. Article 2 of the Protocol nevertheless states expressly that no amendment of the Statute may be made without the consent of all the contracting states.

Fifth Reservation: "That the Court shall not render any advisory opinion except publicly, after due notice to all states adhering to the Court and to all interested states, and after public hearing or opportunity for hearing given to any state concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest."

It was, of course, this reservation—and particularly the second part of it—that caused the real difficulty and led to the failure of the attempt to secure American participation in 1926. With regard to the first part—the requirement of publicity in relation to advisory opinions—it is true that the practice of the Court from the very start corresponded in fact with the conditions stipulated, and further that, by the amendments introduced by the Court into its rules of procedure in July 1926, this existing practice was expressly defined and placed upon a formal basis, but the United States Government did not regard this as sufficient because of the rules being susceptible of alteration by the Court itself. The Protocol, therefore, gives direct international sanction to the existing practice, and takes it out of the power of the Court to depart from it, by providing in Article 4 that "the Court shall render advisory opinions in public session after notice and opportunity for hearing substantially as provided in the now existing Articles 73 and 74 of the Rules of Court".

The second part of the Fifth Reservation, which is the crux of the whole matter, claims for the United States the unfettered right to veto reference to the Court of any given case for advisory opinion. This claim was based upon the assumption that unanimity is requisite for a decision of the Council to consult the Court, so that the Senate considered that it was merely asking for equality with the members of the Council in this matter. The difficulty involved for the Members of the League was twofold: in the first place, the question whether or not a unanimous vote is necessary for the adoption of a request for advisory opinion is a disputed one which, for reasons of policy, it has not so far been deemed expedient to settle; secondly, even assuming that unanimity were required, the exercise of a veto by Members of the League, with full knowledge of all the issues and a full sense of their responsibility for the maintenance of peace, is a different thing to a *liberum veto* by the United States, standing outside, free from the obligations of the Covenant, possibly unaware of the implications and consequences of its action. The advisory function of the Court has already proved too valuable as a means of settling international disputes not susceptible of solution by other means for the Members of the League to be able lightly to contemplate the risk of its being rendered unworkable.

The solution of the problem was devised by Mr. Root, and embodied in Article 5 of the Protocol, which was drafted by Sir Cecil Hurst. In view of its importance this provision must be quoted in full:

> "With a view to ensuring that the Court shall not, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest, the Secretary-General of the League of Nations shall, through any channel designated for that purpose by the United States, inform the United States of any proposal before the Council or the Assembly of the League for obtaining an advisory opinion from the Court, and thereupon, if desired, an exchange of views as to whether an interest of the United States is affected shall proceed with all convenient speed between the Council or Assembly of the League and the United States.
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> "Whenever a request for an advisory opinion comes to the Court, the Registrar shall notify the United States thereof, among other states mentioned in the now existing Article 73 of the Rules of Court, stating a reasonable time-limit fixed by the President within which a written statement by the United States concerning the request will be received. If for any reason no sufficient opportunity for an exchange of views upon such request should have been afforded and the United States advises the Court that the question upon which the opinion of the Court is asked is one that affects the interests of the United States, proceedings

shall be stayed for a period sufficient to enable such an exchange of views between the Council or the Assembly and the United States to take place.

"With regard to requesting an advisory opinion of the Court in any case covered by the preceding paragraphs, there shall be attributed to an objection of the United States the same force and effect as attaches to a vote against asking for the opinion given by a Member of the League of Nations in the Council or in the Assembly.

"If, after the exchange of views provided for in paragraphs 1 and 2 of this article, it shall appear that no agreement can be reached and the United States is not prepared to forgo its objection, the exercise of the powers of withdrawal provided for in Article 8 hereof will follow naturally without any imputation of unfriendliness or unwillingness to co-operate generally for peace and goodwill."

It will be seen that the system adopted is flexible, and it should prove effective. Every possible safeguard is afforded to the United States whilst at the same time the advisory procedure remains workable. The essential points are plain: notice is given by the League to the United States of any proposal for a reference to the Court, followed, if necessary, by an exchange of views. In the majority of cases, no such exchange will be called for—disputes or questions submitted to the Court will, in the future as in the past, generally be such as obviously do not concern the United States, and on receipt of an intimation to this effect the Council[1] will proceed with the matter as at present. In cases where the United States puts forward an objection based upon a definite and recognizable interest, the immediate abandonment of the proposal will probably result; in other cases—where, e.g. further exploration is needed as to the position of the United States in regard to the proposed request for advisory opinion—the "exchange of views" will take place. This will allow of the whole subject being discussed and, if necessary, amendments being made in the terms of the question put to the Court. If the exchange does not lead to the United States waiving their objection, the probability is that the Council or Assembly would drop the proposal rather than cause the United States to withdraw from the Court. As an additional precaution, paragraph 2 of Article 5 provides for a stay of proceedings before the Court itself in the event of insufficient opportunity for the exchange of views having been afforded before the adoption of the request for opinion—where e.g. the question has come up at the end of a session. In the last resort the United States can avail itself of the right of withdrawal under the last paragraph. As already stated, the necessity for recourse to this extreme measure is very unlikely to occur. If it did, the proceedings for advisory opinion would go forward, the withdrawal of the United States would "follow naturally without imputation of unfriendliness" and any opinion rendered by the Court[1] would have no more force or effect as regards the United States than at present.

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[1] The Assembly has never yet sought the advisory opinion of the Court, and for practical reasons it hardly seems likely that it will do so, except perhaps in very exceptional circumstances.

It is clear that the requirements underlying the Senate's reservation are met to the full by this system. From the point of view of the League, perhaps the chief drawback is the delay that may be involved, which in some cases is an important consideration, but if and when American adhesion becomes an accomplished fact the goodwill of the State Department can no doubt be relied upon to reduce this inconvenience to a minimum.

One word more may be added with reference to paragraph 3 of Article 5. This, of course, was inserted in view of the undecided question as to the necessity or otherwise for unanimity in requesting an advisory opinion, and for the purpose of giving the same force, whatever it may be, to an objection of the United States as to an adverse vote of a member of the Council or Assembly. It is clear, that this provision is applicable to any proceedings of either of those bodies, or of the Court itself, in which the validity of the *request* for opinion is challenged. But it is equally clear that it has no bearing upon the position of the United States as a non-Member of the League in the event of any dispute to which it is a party being referred to the Court for opinion. If one can imagine such a dispute being referred to the Court in the face of American objection, there can be no doubt that the Court would refuse to give the advisory opinion in accordance with its ruling in the *Eastern Carelia* case,[2] and this irrespective of whether the United States exercised its right of withdrawal or not.

As already stated, the United States signed the Protocol of Accession, together with the Protocol of Signature of the Statute, on December 9, 1929. Both are subject to ratification—the former will only come into force when it has been ratified by all the states which have accepted the Statute, as well as by the United States—but there is every hope that this time American ratification will be forthcoming. Indeed, the note[3] in which Secretary of State

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[1] The Court would not render an opinion if the matter were a dispute to which the United States was a party; see below.

[2] *Publications of the Court*, Series B, No. 5.

[3] This note, dated November 18, 1929, has been published by the American Foundation, 565 Fifth Avenue, New York.

Stimson recommended signature to the President expresses unqualified approval of the solution arrived at, supported by a full statement of reasons, which it is difficult to believe can fail to convince the Senate.

Statute Revision.

The proposal to revise the Statute of the Court originated in the Ninth (1928) Assembly of the League. The first nine-year term of the judges being due to expire in 1930, it was felt that a suitable moment had arrived for reviewing, in the light of past experience, the working of the existing Statute, and for introducing, before the new election, such changes as might appear desirable. The discussion in the Assembly makes it clear that the intention was not fundamentally to recast the Statute, but to limit the changes to remedying such imperfections as had been revealed in actual practice.

By a resolution adopted on September 20, 1928, the Assembly invited the Council to take up this question and the Council accordingly appointed the committee of jurists mentioned in the first part of this paper for the purpose of formulating proposals. The Court itself was not consulted as to the desirability of revising the Statute, but its President, M. Anzilotti, and Vice-President, M. Huber, were asked to participate in the work of the Committee, and consented to do so.[1] The Committee met at Geneva on March 11, 1928, and on March 19 adopted a report[2] recommending a number of amendments. This report was approved by the Council[3] and considered by the conference of states parties to the Statute convened to meet at Geneva in September 1929. As a result of discussion by this conference certain changes and additions were made in the jurists' draft, and the amendments to be introduced into the Statute were embodied in a "Protocol for the Revision of the Statute of the Permanent Court of International Justice" adopted on September 12, 1929.[4] This Protocol was then approved by the Assembly, and it was signed on behalf of forty-eight states on September 14, and subsequent days. On December 9 the Protocol for Revision, like the Protocol of Accession, received the signature of the United States.

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[1] They stated that their attendance should not be regarded as implying that they were of opinion that revision was necessary.

[2] *League of Nations Document* C. 142, M. 52, 1929, V. 4. The report is also reproduced in *The United States and the World Court* mentioned on p. 86, n. 1, above.

[3] *League of Nations Official Journal*, 10th Year, p. 996.

[4] *League of Nations Document* A. 50, 1929, V. White Paper *Cmd.* 3432 of 1929.

Sixteen of the existing Statute's sixty-four articles are amended by the Revision Protocol, but several of the amendments are consequential ones and some are merely verbal improvements of the original text. The principal changes of substance relate to the composition of the Court, the main purpose being to stabilize the Bench and, in view of the growth of business before it, to increase the accessibility of the Court. When the Statute was first drawn up it was thought that the Court would have comparatively little to do, and this determined the system adopted, whereby, on the one hand, a single ordinary annual session was to be held at a fixed date each summer, and, on the other, deputy-judges were appointed for the purpose of replacing judges prevented from attending, the idea being that this would only be exceptionally necessary, and practically confined to the case of occasional extraordinary sessions. In fact, however, the volume of work before the Court has, from the first, been heavy. In addition to the eight ordinary summer sessions, nine extraordinary sessions have been called for; sixteen judgments and sixteen advisory opinions have been delivered, and a number of orders of varying importance made. The Revision Protocol, therefore, provides that the Court shall consist of fifteen judges (instead of eleven judges and four deputy-judges as at present), and that the Court shall remain permanently in session except during the judicial vacations, the dates and duration of which shall be fixed by the Court. As a corollary to this, it is laid down that "members of the Court shall be bound, unless they are on regular leave or prevented from attending by illness or other serious reason duly explained to the President, to hold themselves permanently at the disposal of the Court".[1] In order to meet requirements of judges belonging to distant countries, provision is made for six months' leave every three years, not including the time spent in travelling, in the case of members whose homes are situated at more than five days' journey from The Hague.

At the present time, the full Court, which sits in all cases not submitted to one of the special chambers,[2] consists of eleven members, with nine as the necessary quorum. Under the new text of Article 25 of the Statute, the full Court, consisting of the fifteen judges, is to sit in the same way, but "subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, the Rules of Court may provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting". The quorum is maintained at nine. The amendment cited was suggested by Sir Cecil Hurst and supported by Mr. Root and appears to contemplate a system of rotation enabling a judge, while not sitting in one case, to be at work upon a case he had previously heard, the aim being economy of time and a remedy for the disadvantages of too large a Bench.[1] It will be noticed that the provision in question is purely permissive, and, if I may venture to express a personal view, I hope advantage will not be taken of it by the Court. Up to the present the system, which prevails in some Continental and American courts, of appointing a *rapporteur* to prepare the judgment has been eschewed by the Court, and any departure from this practice would, I think, be very regrettable. No serious delay has resulted from the present system. Moreover, taking into account the provisions for long leave mentioned above, and the accidental absences which are bound to occur, it would not seem that the number of judges sitting will normally be greatly in excess of the present number, without having recourse to this expedient.

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[1] New text of Article 23.

[2] Summary procedure, Labour, Transit, and Communications.

As a consequence of the abolition of deputy-judges, a single set of disqualifications is made applicable to all the members of the Court and the existing disqualifications are strengthened. Thus, besides being precluded from exercising any political or administrative function, as at present, the judges may not engage in any other occupation of a professional nature, and they may not act as agent, counsel, or advocate, not merely "in any case of an international nature" as at present, but "in any case".[2]

It was clearly necessary, in view of the obligation imposed upon the members of the Court to reside at or near The Hague as well as the further limitations placed upon their outside activities, to alter the basis of their remuneration, and Article 32 is accordingly amended so as to provide for a fixed annual salary, instead of an annual indemnity plus a service allowance and travelling expenses. The salary proposed is 45,000 Dutch florins, with a special additional allowance for the President and Vice-President, these sums to be, as at present, free from all taxation.[3]

A small point which had given rise to practical difficulty is met by the provision inserted in Article 13, defining the procedure to be followed in the event of the resignation of a member of the Court.

Before leaving the subject of the Court's personnel, it should be noted that the conference which drew up the Revision Protocol recommended that the candidates nominated for election to the Court should, in addition to the qualifications laid down by Article 2 of the Statute, possess "recognized practical experience in international law" and that they should be at least able to read both official languages of the Court and to speak one of them. The Assembly endorsed this recommendation,[1] which will accordingly be brought to the notice of the national groups whose duty it is to make nominations. Both the meaning and the utility of the first requirement are open to doubt,[2] but the second is a useful reminder to those responsible for nominating candidates of a condition which is of the highest practical importance for the satisfactory working of the Court.

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[1] *Minutes of Jurists Committee*, pp. 70, 74.

[2] New text of Article 17.

[3] See Council resolution of September 13, 1929.

A group of miscellaneous amendments must now be considered. At the suggestion of Brazil a clause was inserted in Article 4 of the Statute to the effect that "the conditions under which a state which has accepted the Statute of the Court, but is not a Member of the League of Nations may participate in electing the members of the Court shall *in the absence of special agreement* be laid down by the Assembly on the proposal of the Council". The words here printed in italics refer, of course, to the position of the United States. At the present time Brazil is the only state which has accepted the Statute but is not a Member of the League. Besides Brazil and the United States, there are two states—Ecuador and the Hejaz—which are mentioned in the Annex to the Covenant but are not Members of the League. To them the Court is unconditionally open and they can accept the Statute at any time by becoming parties to the Protocol of Signature. If they did so, the provision cited above would apply to them. But does it apply to any other states? It would appear that the words "a state which has accepted the Statute" would apply to a state which had deposited with the Registrar of the Court a general declaration under the Council's resolution of May 17, 1922.[3] There are eleven states to which this procedure is open, including Egypt, Mexico, Russia, and Turkey, but none has so far taken advantage of it.

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[1] By 32 votes to 15.

[2] It is not so much "experience of international law" as a judicial outlook and wide experience of law and affairs in general that seem important. It has been suggested that these words were intended to refer to legal advisers of the various Foreign Offices, but it is difficult to believe that a majority of the Assembly desired the habitual appointment of official jurists as candidates for election.

[3] i.e. the resolution laying down the conditions under which the Court is open to states which are neither Members of the League nor mentioned in the Annex to the Covenant. The words of acceptance are the same as in the Protocol of Signature. The resolution is printed in the *Publications of the Court*, Series D, No. 1, p. 48, and Series E, No. 1, p. 142; No. 3, p. 89.

Article 31 of the Statute, which deals with the subject of national judges, is redrafted, partly in view of the abolition of deputy-judges, and partly in the interest of consistency. Whereas under the original Statute differences were made in the matter of national judges as between the full Court on the one hand, and the Special Chambers for Labour and Transit cases and the Chamber for Summary Procedure on the other, the principle that a judge of the nationality of each party should sit on the Bench is now applied uniformly in all cases. In consequence of this amendment the normal strength of the Chamber for Summary Procedure (where national judges have not sat) is increased from three to five judges.[1] It may well be that these changes will lead to greater use being made of the summary procedure of the Court, which has hitherto been neglected.[2]

A small but not unimportant point is the removal of an ambiguity in Article 39, the last paragraph of which provides for the use of a language other than French or English in proceedings before the Court. It is now made plain that the Court may grant the necessary permission at the instance of a single party.

Article 40 is brought into line with the existing Rules of Court by providing that the Registrar shall notify applications instituting proceedings to the states entitled to appear before the Court[3] as well as to the Members of the League through the Secretary-General.

This completes the amendments of the existing articles of the Statute,[4] but there remains to be noticed the addition of a new chapter relating to Advisory Opinions. It has always seemed somewhat curious and unsatisfactory that no mention of this important subject was made in the final text of the Statute as adopted in 1920. The existence of the Court's advisory jurisdiction was left to be inferred from the reference to Article 14 of the Covenant in Article 1 of the Statute, and from Article 36, which states that "the jurisdiction of the Court comprises . . . all matters specially provided for in treaties and conventions in force"; and the exercise of the jurisdiction was left to be regulated by the rules of procedure made by the Court itself. Under the revised Statute, the substance of the Rules of Court dealing with this matter have been incorporated into the Statute as Articles 65, 66, and 67, and a new Article 68 has been added which provides that "in the exercise of its advisory functions, the Court shall further be guided by the provisions of the Statute which apply in contentious cases, to the extent to which it recognizes them to be applicable". It is to be observed that even as regards the last-mentioned article no change in the existing practice is introduced—the effect of the revision on this point is merely to transfer the present rules and practice from the domain of internal regulation to that of international compact.

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[1] Articles 26 (Chamber for Labour Cases) and 27 (Chamber for Transit Cases) are also amended, but the only point not merely consequential is that it is now provided expressly that recourse to the summary procedure is permissible in these cases.

[2] There has only been one case: Series A, No. 3.

[3] This includes states not parties to the Statute.

[4] I have passed over a few small verbal corrections.

The foregoing account of the proposed revision of the Statute will suffice to show that those concerned have strictly respected the spirit of the mandate entrusted to them. No fundamental remodelling has been attempted; no sweeping changes have been introduced. The Court's jurisdiction and procedure are untouched; the essential characteristics of its constitution remain the same. Even the increase in the number of judges, which is the most striking feature, was contemplated by Article 3 of the original Statute. The alterations made are in the line of natural development. If an Irishism may be permitted, the Court under the revised Statute is the same Court only more so. As in the case of all other human institutions, the personality of those composing it must ultimately determine the measure of its utility, but so far as the machinery for carrying out its task is concerned, the new provisions should tend on the whole to facilitate the accomplishment by the Court of its mission in developing international law and consolidating international peace.

General Observations.

The conditions necessary for making American participation effective, and for bringing the amendments to the Statute into force, as well as the relation between the two, involve certain complications as to which it may be well to say a word or two. As we have seen in the first part of this paper, the Accession Protocol comes into force only upon ratification by all the parties to the Protocol of Signature of the Statute dated December 16, 1920, plus the United States. In other words it requires ratification by forty-one Members of the League, by Brazil and by the United States. The Revision Protocol, on the other hand, whilst also subject to ratification, contains the following remarkable clause: "The present Protocol shall enter into force on September 1, 1930, provided that the Council of the League of Nations has satisfied itself that those Members of the League of Nations and states mentioned in the Annex to the Covenant which have ratified the Protocol of December 16, 1920, and whose ratification of the present Protocol has not been received by that date, have no objection to the coming into force of the amendments to the Statute of the Court which are annexed to the present Protocol." It is hardly an exaggeration to describe this provision as a revolution in the history of international agreements. This is not the place to discuss either its merits or the constitutional and other problems which it raises, but the reason for its insertion is plain enough, namely, the need for securing that the amendments of the Statute should come into force before the election of the judges, and if it fulfils its purpose it may well be that the Revision Protocol will come into force before the Accession Protocol. In that event, the United States would be adhering to an out of date Statute, unless some provision was made to prevent such a state of affairs. This is done by Article 7 of the Revision Protocol, which states that "for the purposes of the present Protocol, the United States of America shall be in the same position as a state which has ratified the Protocol of December 16, 1920". In other words, the United States has the same status as the other Powers both in regard to preventing the Revision Protocol from coming into force and in regard to becoming a party to it by ratification. As already stated, its signature has been affixed to all three documents: the Protocol of Signature of December 16, 1920, the Protocol of Accession, and the Protocol for Revision. If the first is ratified by the United States and the other two come duly into force before the Assembly meeting for the election of the judges, viz. September 1930, all will be plain sailing, for the Revision Protocol further provides that "after the entry into force of the present Protocol, any acceptance of the Statute of the Court shall constitute an acceptance of the Statute as amended", and the United States will, therefore, by ratification of the Protocol of December 16, 1920, have become party to the amended Statute, subject to the terms of the Accession Protocol. If the Revision Protocol comes into force in time, but the Accession Protocol does not, the United States will automatically become a party to the amended Statute if and when it ratifies the three instruments, but the United States will not be able to participate in the election of the judges.

But what will happen if the Revision Protocol, notwithstanding the special clause mentioned above, does not come into force in time for the election? In this event, it would seem possible to carry out most of what is really essential in the Revision Protocol by adopting the following procedure: (1) increase the number of judges under the terms of Article 3 of the Statute, i. e. by a decision of the Assembly of the League upon the proposal of the Council, and elect say fifteen judges and the four deputy-judges; (2) the Assembly to adopt a resolution regarding the remuneration of the members of the Court, following as closely as possible the proposals embodied in the Revision Protocol; (3) the Assembly to invite the Secretary-General, when requesting the national groups to nominate candidates under Article 5 of the Statute, to observe the recommendations referred to above as to the requisite knowledge of languages, &c., and to assure themselves that the candidates are prepared to devote to the Court the whole of their time, or so much of it as may be required. This would in practice make it possible to hold continuous sessions and virtually dispense with the deputy-judges.

THE FUNCTIONS AND DIFFERING LEGAL CHARACTER OF TREATIES.[1]

By ARNOLD D. McNAIR, C.B.E., LL.D., Fellow and Senior Tutor of Gonville and Caius College, Cambridge.

THE following remarks are prompted by the belief that inadequate attention has been given by students of International Law to the widely differing functions and legal character of the instruments which it is customary to comprise under the term "treaty". It is suggested that this branch of the law would be in a more advanced state if more writers on the subject would study these essential differences and endeavour to provide for them instead of attempting to lay down rules applicable to treaties in general.[2] Most writers recognize and enumerate different kinds of treaties but either fail to realize, or only realize insufficiently, that these differences do not stop short at their contents but affect their legal character as well. No attempt will be made here to construct a new classification of treaties. I shall content myself with pointing out by means of a few illustrations the essential juridical character of certain types of treaties and the legal consequences which seem to me to follow.

The internal laws of the modern state provide its members with a variety of legal instruments for the regulation of life within that community: the contract; the conveyance or assignment of immovable or movable property, which may be made for valuable consideration or may be a gift or an exchange; the gratuitous promise clothed in a particular form; the charter or private Act of Parliament creating a corporation; legislation, which may be constituent, such as a written constitution, fragmentary or complete, or may be declaratory of existing law, or create new law, or codify existing law with comparatively unimportant changes. Further, though rarely, we may find a constitutional document which closely resembles the international treaty itself, for instance, Magna Carta.[3]

It would not be suggested that all these differing private law transactions are governed by rules of universal or even of general application, and yet such is the underlying assumption of international lawyers in dealing with the only and sadly overworked instrument with which international society is equipped for the purpose of carrying out its multifarious transactions. Thus, if international society wishes to enact a fundamental, organic, constitutional law, such as the Covenant of the League of Nations was intended to be and in large measure is in fact, it employs the treaty. If two states wish to put on record their adherence to the principle of the three-mile limit of territorial waters, as in the first article of the Anglo-American Liquor Convention of 1924, they use a treaty. If further they wish to enter into a bargain which derogates from that principle, again they use a treaty. If Denmark wishes to sell to the United States of America her West Indian possessions, as she did in 1916, or if Great Britain wishes to cede Heligoland to Germany in return for a recognition of certain British rights in Africa, as happened in 1890, they do so by treaty. Again, if the great European Powers are engaged upon one of their periodic resettlements and determine upon certain permanent dispositions to which they wish to give the force of "the public law of Europe",[1] they must do it by treaty. And if it is desired to create an international organization such as the International Union for the Protection of Works of Art and Literature, which resembles the corporation of private law, it is done by treaty.

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[1] Based on a lecture delivered at the request of the University of London on May 7, 1930, and upon lectures delivered at the *Institut Universitaire des Hautes Études Internationales* at Geneva.

[2] For a recent survey of existing classifications, see Rapisardi-Mirabelli in *Révue de Droit International et de Législation comparée*, 3rd Ser., Vol. IV (1923), pp. 653–67.

[3] On its legal character, see McKechnie, *Magna Carta* (2nd ed.), pp. 104–7.

Is it likely, on the face of it, that all these multifarious types of treaties can be effectively governed by the same system of rules, whether recruited from the private law of contracts or from elsewhere? The assumption that they are so governed is responsible, I venture to think, for a number of the difficulties which this branch of law has produced and which will only be removed as and when the essential differences between certain kinds of treaties are more widely appreciated.

1. TREATIES HAVING THE CHARACTER OF CONVEYANCES.

There is a class of treaties called "transitory" (unfortunately, as Westlake points out,[2] because their characteristic is the permanence of their effect), or "dispositive"; these are treaties whereby one state creates in favour of another, or transfers to another, or recognizes another's ownership of, real rights,[1] rights *in rem*, for instance, in particular, treaties of cession including exchange. In this class we must also place a treaty like that of 1783 between Great Britain and the new United States of America, whereby the former recognized the independence and the territorial limits of the latter and relinquished "all claims to the government, propriety, and territorial rights of the same". Closely akin are treaties which confer upon one party real rights in the territory of the other, whether we choose to call those rights international servitudes or not.[2] Not quite so closely akin are treaties which enable the nationals of one party to acquire, for instance, by purchase or by inheritance, or to retain, real rights in respect of land subject to the sovereignty of the other. Let us examine some of these treaties in the light of a war supervening between the two contracting parties. Great confusion—not by any means dispelled—has resulted from hasty generalizations to the effect that war abrogates all treaties between the parties. As late as 1815 we find Lord Bathurst writing to John Quincy Adams, the American Secretary of State, as follows: "Great Britain . . . knows of no exception to the rule that all treaties are put an end to by a subsequent war between the same parties", though later in the same note he admits the possibility of the existence of certain irrevocable provisions in such treaties.[3] So also President Polk, in his annual message of December 7, 1847, announced that "A state of war abrogates treaties previously existing between the belligerents",[4] and in 1898, upon the outbreak of the Spanish-American War, the Spanish Government announced that it held the same view.[5] Phillimore[6] tells us that "it was at one time an international custom that the Belligerents should, at the breaking out of war, make a public and solemn proclamation that the obligations of Treaties between them had ceased. That custom has become obsolete. In the place of it has arisen the general maxim, that War, *ipso facto* (*von selbst*), abrogates Treaties between the Belligerents".

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[1] See, for instance, Article 7 of the Treaty of Paris, 1856, which admitted Turkey to participation "in the advantages of the Public Law and System (*Concert*) of Europe".

[2] *International Law*, Vol. I, Peace (2nd ed.), pp. 60, 294.

We know now that these generalizations are incorrect and that certain kinds of treaties survive a war, though suspended in operation during the war, and that certain other kinds operate during the war. It is common to base these exceptions to the general principle upon the intention of the parties at the time of entering into the treaty.[1] I am not sure whether a better test will not be found to consist in an examination of the true juridical character of the treaty in question; but in any case it will be admitted that once the juridical character of the instrument is understood it will be easier to determine the intentions of the parties. For instance, the real reason why a treaty of cession, whether or not it forms part of a treaty of peace, is not, once it has been carried out, affected by a subsequent state of war between the parties is surely that the treaty has, like a conveyance, produced its effect and has ceased to have vitality; it remains a link in the title of the new owner of the territory but that is all; it creates no outstanding obligations; it was intended to, and did, transfer certain rights *in rem* from the old owner to the new one. Could it be suggested that the outbreak of war between France and Germany in 1914 abrogated the cession of Alsace-Lorraine by France to Germany by the Treaty of Frankfort of 1871? France might well have intended that the loss of Alsace-Lorraine should not survive a future war with Germany, but it is clear from the legal character of the treaty that the cession is unaffected by the outbreak of the war of 1914. Mr. Justice Washington in the case of the *Society for the Propagation of the Gospel* v. *The Town of New Haven* in 1823, uses language which is pertinent here:

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[1] This is not the distinction which Grotius, *De jure belli ac pacis*, II, xvi, 16, makes between *pactum reale* and *pactum personale*, though there is a note by H. Cocceius on this passage, cited in *Fox* v. *Southack* (1815) 12 Mass. at p. 148 (Scott, *Cases on International Law* (1922) at p. 468) which comes nearer: *pactum liberatorium quo pax remissa aut transactio facta est, qua jus extinctum reviviscere non potest.*

[2] See McNair in *British Year Book of International Law*, 1925, pp. 111–27.

[3] Moore, *International Law Digest*, § 779, Vol. V, p. 383.

[4] *Ibid.*, p. 375.

[5] *Ibid.*, p. 375.

[6] *International Law*, Vol. III (3rd ed.), DXXX.

> "There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial and other national rights, or, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. *If such were the law, even the treaty of* 1783, *so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.*"[2] (Italics mine.)

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[1] See, for instance, Hurst in *British Year Book of International Law*, 1921–2, pp. 37–47.

[2] United States Supreme Court, 8 Wheaton 464; Hudson, *Cases on International Law* at p. 967; Dickinson, *Cases and Readings upon the Law of Nations*, at p. 1115. For the claim of the United States to possess an interest in the overseas possessions of Germany ceded by her by the Treaty of Versailles, though not ratified by the United States, on the ground that it was an executed grant in favour of designated grantees (of which it was one) and required no formal assent by the grantees by convention, see Hyde in the *American Secretaries of State and Their Diplomacy*, Vol. X (C. E. Hughes), p. 240.

The learned judge was, however, not dealing with the effect of the war of 1812 between Great Britain and the United States upon a cession of British territory to the new Republic (though clearly he would have regarded such a cession as presenting an *a fortiori* case), but with its effect upon the title to lands in one of the states which a British corporation was permitted by the treaty of 1783 to retain, which was confirmed to it by a treaty of November 19, 1794, and which had not been divested by any legislative act having validity superior to those treaties. "The termination of a treaty", he says, "cannot devest rights of property already vested under it."[1] We must not confuse rights of sovereignty transferred by one state to another with rights of property which one state by treaty with another state permits the nationals of the latter to acquire in the territory of the former, but there is much in common between treaties which transfer real rights from one state to another and treaties which enable the nationals of one state to acquire and hold real rights in the territory of another.

There is abundant judicial authority for the proposition last cited from Mr. Justice Washington's judgment. We need only refer here to the judgments of Sir John Leach, Master of the Rolls, in *Sutton* v. *Sutton*[2] in 1830, of Mr. Justice Cardozo of the Court of Appeals of New York in *Techt* v. *Hughes*[3] in 1920, and of the Supreme Court of Kansas in *State* (*of Kansas*) v. *Reardon*[4] in 1926. In the last two cases reciprocal privileges of the inheritance of land conferred by treaty upon the nationals of two contracting states were held to survive the occurrence of a war between them. It will be noticed that in the *Society for the Propagation of the Gospel's* case and in *Sutton* v. *Sutton*, what was upheld was a proprietary right acquired before the outbreak of the war alleged to have abrogated the treaty giving rise to that right. On the other hand in *State* (*of Kansas*) v. *Reardon* the treaty dated from 1828, the war broke out in 1917, and the descent was cast in 1924; nevertheless the treaty was upheld as a continuing source of proprietary rights, namely, the right of the deceased's alien

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[1] *Ibid.*, see also Marshall, C.J., in *Chirac* v. *Chirac* (1817) 2 Wheaton, 259, 277 (Moore, *op. cit.*, § 780) "the treaty had its full effect the instant a right was acquired under it; it had nothing further to perform, and its expiration or continuance afterwards was unimportant".

[2] 1 Russell and Mylne, 663; Scott, *Cases on International Law* (1922), p. 468.

[3] 229 N.Y. 222; Hudson, *op. cit.*, p. 969.

[4] 245 Pacific Reporter, 158 (1926); 120 Kansas, 614; *Annual Digest* (McNair and Lauterpacht), 1925–1926, p. 438.

(ex-enemy) heir to inherit and to sell the land and to withdraw the proceeds from the United States.[1]

2. TREATIES HAVING THE CHARACTER OF CONTRACTS

We now come to an even more fundamental distinction, namely, that between treaties whose essential juridical character is that of the Contract, and treaties whose essential juridical character is that of Law-making or Legislation. This distinction is at least half a century old, but its full implications are not yet realized. Lauterpacht[2] tells us that it was introduced into international law by Bergbolm (in 1877) and Triepel (in 1899) and that it is Oppenheim who is mainly responsible for familiarizing British and American writers with the conception. On the one hand we have the *Vertrag* or contract where

> "the will of one party is different from that of the other, the contract (*Vertrag*) being here a means for achieving different and opposite ends. Thus while the purchaser promises to pay the money, the seller undertakes to deliver the goods. On the other hand, (we have) the agreement (*Vereinbarung*) which serves the purpose of realizing identical aims."

I acknowledge that the *Vereinbarung* makes rules only binding two parties, but the modern multilateral law-making treaty, about which I have a good deal to say later, is merely the *Vereinbarung* raised to a higher power. The many contracting parties concur in the purpose of creating identical rules binding upon all of them.

My main point in referring to the contrast between these two types is that the old treaty which predominated until the Congress of Vienna[3]—treaties of peace, alliance, friendship, neutrality, guarantee, commerce, &c.—was essentially the *Vertrag*; whereas the modern treaty of rapidly developing importance is the multilateral treaty[1] which has been concluded in large numbers during the last half century and particularly since the Great War and which often creates international unions, such as the Copyright Union, or international régimes, such as that of Freedom of Transit, or partial international codes such as The Hague Conventions, and this modern type is essentially the *Vereinbarung.* I suggest that it is significant that the seed-bed of the traditional rules as to the formation, validity, interpretation, and discharge of treaties which swell the bulk of our text-books, too often written in slavish imitation of their predecessors, was sown at a time when the old conception of a treaty as a compact, a bargain, a *Vertrag*, was exclusively predominant and the dawn of the new multilateral treaty had not begun.

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[1] It appears to be the view of the United States Supreme Court that in point of permanence a treaty creating rights of personal status (e.g. of migration) is different; see *Karnuth* v. *United States* (1929) 279 U.S. 231, 49 Supreme Court, 274; Hudson, *op. cit.*, p. 977.

This decision presumably overrules that of the United States Circuit Court of Appeals in *John B. McCandless* v. *United States* ex rel. *Paul Diabo* given on March 9, 1928; see McNair, 'La terminaison et la dissolution des traités', in Hague Academy *Recueil des Cours*, 1928, Vol. II, at p. 505, though it is just possible that the relator's Indian status makes a difference. See also the *Chinese Exclusion Case*, Hudson, *op. cit.* p. 1121; Moore, *op. cit.*, V, § 780; Dickinson, *op. cit.*, p. 828.

[2] *Private Law Sources and Analogies of International Law* (1927), § 70.

[3] I do not overlook such earlier treaties as those cited by Hyde, *International Law*, Vol. II, § 799, for the denomination of contraband.

The legal identity of treaties and contracts[2] is almost universally assumed by writers upon International Law, while recognizing, of course, certain differences such as the effect of duress in the conclusion of a treaty and the effect upon a treaty of the *rebus sic stantibus* doctrine. I do not wish to challenge that analogy, but three comments may be permitted; (*a*) in the matter of form, it is undeniably true; the nearest approach in private law to the treaty in point of form is the contract; and (*b*) there being no sovereign body above the states, it is convenient to seek in the consent of the parties either the cause, or a condition, of the binding force of a treaty, though the effect of doing this may be at once to invest the treaty with the whole panoply of contractual notions;[3] but (*c*) we must be on our guard against the assumption that, merely because treaties have borrowed from private law contracts their form and the source of their binding force, all the rules as to formation, validity, interpretation, and discharge of contracts are equally applicable to treaties.[4]

Can we find any embryo traces of the effect of a growing recognition of the distinction between our two types, the contractual treaty and the law-making treaty, upon the rules of

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[1] See Hudson, "The Prospect for International Law in the Twentieth Century", in *Cornell Law Quarterly*, X (1925), at pp. 432–4.

[2] For an examination, see Lauterpacht, *op. cit.*, § 69–79a.

[3] For the purposes of my point it does not matter whether the consent of the parties is looked upon as the source of the obligation of treaties or merely as a condition essential to the operation of some other source of obligation: see Lauterpacht, *op. cit.*, § 25.

[4] Réglade in an article entitled "De la Nature juridique des Traités internationaux et du sens de la distinction des traités-lois et des traités-contrats" in *Revue du droit public et de la science politique*, XLI (1924), p. 505, asserts the necessity of regarding all treaties as contracts in order to ensure that they will be enforced by the internal law of the contracting parties.

International Law governing treaties? I think we can. I call them embryo traces, and the illustrations are still apt to be somewhat blurred, because the distinction is yet in its infancy. Let us examine some of them.

Travaux préparatoires. A well-known cleavage exists between the British and the Continental rules upon the interpretation of a statute, in this respect that in England the courts are not allowed "to seek the aid of parliamentary debates, reports of Royal Commissions, or other preliminary documents, when endeavouring to interpret the obscurities of a statute",[1] whereas the general legal tradition of Europe not only does not forbid but actively encourages this practice. Broadly speaking, the same contrast between the two schools exists in the permissibility of resort to the preliminary negotiations of the parties as an aid to the interpretation of their written contract.[2] At the present moment international tribunals, in particular the Permanent Court, are busy deciding whether they are going to adopt the English or the Continental practice. It will suffice for the moment to say that international practice forbids resort to *travaux préparatoires* when the text of a treaty is sufficiently clear in itself, the implication being that, when the text is not clear, this source of interpretation may be invoked. At any rate, it constantly is invoked and is not ruled out *in limine.*[3] Professor Quincy Wright[4] detects the emergence of a distinction between contractual treaties and law-making treaties in the degree to which a tribunal called upon to interpret a treaty will resort to the study of *travaux préparatoires.* He points out that a tribunal is more ready to take this step in the case of the former kind of treaties than in the case of the latter. It is open to doubt whether this tendency has yet become conscious and defined, but it seems to me to be intrinsically reasonable. In the case of contractual treaties the number of parties is usually small and they have been in close contact during the negotiation of the treaty; it is therefore not unreasonable, when the text is not clear, to seek from their preliminary negotiations guidance as to their common understanding of an ambiguous expression. In the case, however, of a multilateral law-making treaty it is common to find that only a few of the more important signatories[1] took part in the negotiation of the treaty, which, upon signature or ratification by them, was thrown open to the world for accession; in such a case it would be unreasonable to expect acceding states to be or to make themselves familiar with "the preliminary conversations of the original negotiators".[2] This was the argument advanced by counsel for the French Government before the Permanent Court in the discussion of their combined second and third advisory opinion upon the competence of the International Labour Organization, namely, "that Powers who took no part in the preparatory work were invited to accede to the Treaty as it stood, and did so accede",[3] without (it may be added) having had the text of the preparatory work communicated to them.[4]

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[1] See Herbert Smith in *Journal of Comparative Legislation*, 3rd Series, Vol. IX, pp. 155–8.

[2] Anson, *Law of Contract* (17th ed., 1929, by Miles and Brierly), p. 314.

[3] See Hyde, "The Interpretation of Treaties by the Permanent Court of International Justice", in *American Journal of International Law*, Vol. XXIV (1930), pp. 13–19, and Oppenheim, *International Law*, Vol. I (4th ed., 1928), p. 763 n.(1); Yu, *Interpretation of Treaties* (1927), pp. 138–202.

[4] *American Journal of International Law*, XXIII (1929), pp. 94–107.

Recognition of States and Governments by Treaty. Again it has been suggested[5] that the question whether or not one state recognizes a new state or the new and revolutionary Government of an old state by entering into a treaty with it may depend upon the nature of the treaty. That the signature of a treaty to which these two states alone were parties would involve recognition seems probable unless recognition were expressly reserved. Professor Hudson has pointed out that the United States of America, both in signing and ratifying the International Sanitary Convention of June 21, 1926, considered it necessary to make an express declaration that in so doing they must not be regarded as granting recognition to any Government (e.g. that of the Soviets) not already recognized by them or as entering into any contractual obligation with a state having a Government unrecognized by them.[6] But this precedent was not followed by the United States when ratifying the Peace Pact of Paris of 1928 on January 17, 1929, after the adhesion of the Union of Socialist Soviet Republics on September 6, 1928. Is it not possible that herein lies yet another distinction between the legislative and other treaties? The creation of a contractual obligation between state A and state B may be difficult to reconcile with the absence of mutual recognition, but there does not appear to be any valid reason why they should not both make a common declaration of intention or give their consent to a new rule of conventional law without according recognition to one another. Though not in diplomatic contact with one another, their mutual relations are governed by law and I see no reason why they should not add to or alter that law while maintaining their diplomatic aloofness.

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[1] e.g. the Declaration of Paris, 1856.

[2] Quincy Wright, *op. cit.*, p. 104.

[3] *Publications of the Court*, Series B, Nos. 2 and 3, p. 41.

[4] See Ehrlich in Hague Academy's *Recueil des Cours*, 1928, Vol. IV, p. 128, n. (1).

[5] Hudson in *American Journal of International Law*, XXIII (1929), at p. 128.

[6] *Ibid.*, at p. 130.

Legality and Morality of Treaties. Most text-writers tell us that a treaty is null and void if its object is either illegal or immoral, and proceed to give somewhat speculative illustrations, such as the encouragement of piracy or slavery or an unprovoked attack upon a third state or the appropriation of part of the open sea. But I suspect that time will show that this rule is only applicable to contractual treaties and ought not to be stated in terms applicable to treaties as a whole.[1]

Obsolescence. The clausula rebus sic stantibus. Has the development of this doctrine been influenced, or ought it to be influenced, by a correct appreciation of the distinction in legal character between the contractual treaty and the legislative treaty?[2] Before attempting to answer these questions it is necessary to notice that the doctrine has a double aspect, legal and political, and to consider, so far as the former aspect is concerned, to what extent an analogy exists in the realm of contract. I suspect that in origin the existence of the doctrine to-day is due to the fact that at one time it formed the subject-matter of an express term in many treaties and that that is why we speak of it as a *clausula.* As we have seen, Phillimore[3] suggests that the now exploded maxim that war abrogates all treaties has a similar origin, namely, that upon the outbreak of a war it was at one time customary for each belligerent to issue a declaration formally repudiating all treaty obligations with its enemy—a practice which some centuries ago was doubtless a true reflection of the scientific nature of the treaty obligations then subsisting.

Fischer Williams, in his article in the *American Journal of International Law*[4] on "The Permanence of Treaties", examines the juridical character of the doctrine *rebus sic stantibus* and points out the analogy to the doctrine of frustration of contract in British municipal law. "Like that doctrine it is really a device by which the rules as to absolute contracts (obligations) are reconciled with a 'special exception which justice demands' in the words of Lord Sumner. It is a legal, not a diplomatic doctrine." I am disposed to agree that, in reference to those kinds of treaties which are contractual not merely in form but in essential juridical character, the doctrine of frustration of contract affords a useful analogy upon the lines of which the *rebus sic stantibus* doctrine may be profitably developed by international tribunals.[1] But I am not so sure that for treaties which are legislative rather than contractual in character this analogy indicates the true line of advance. It may be wiser to recognize that the political or economic or social conditions which made a law-making treaty desirable have changed and that new law adapted to the new circumstances is required. In other words, it may be that the change of circumstances demands in the case of contractual treaties the exercise of the judicial function, and in the case of law-making treaties the renewed exercise of the legislative function. For instance, the Declaration of Paris of 1856 is a typical law-making treaty. The circumstances of modern maritime warfare and of modern economic life have combined to modify profoundly the last three clauses of that Declaration. The modern practice whereby a belligerent state assumes almost the whole responsibility for the feeding of its civil population as well as of its combatant forces has given to the conception of contraband a new meaning which virtually torpedoes the second and third clauses of the Declaration. Yet it is difficult to see how the analogy of the doctrine of frustration of contract would suffice to bring the Declaration of Paris into harmony with modern conditions, or would be the correct method of establishing its obsolescence if that were desired. The remedy is more likely to be a legislative one.

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[1] Réglade, *op. cit.*, p. 521 n., asserts one reason for distinguishing between *traités-lois* and *traités-contrats* to be that a *traité-loi* can be terminated by unilateral denunciation, whereas a *traité-contrat* cannot. I cannot, however, accept this view and consider that the matter is not so simple as that: see McNair, in Hague Academy's *Recueil des Cours*, 1928, Vol. II, at pp. 528–33.

[2] We can dismiss from consideration treaties regarded as transfers of property, because it is clear and is generally admitted that the doctrine can only apply to those articles of a treaty which are still executory (see Oppenheim, *op. cit.*, Vol. I (3rd ed.), p. 689, n. (1)).

[3] *op. cit.*, Vol. III (3rd ed.), DXXX.

[4] Vol. XXII (1928), pp. 89–104. See also Lauterpacht, *op. cit.*, §§ 75–7, and Brierly in *Transactions of Grotius Society*, Vol. XI (1926), at p. 18.

To pursue the municipal analogy, where is there a municipal legislature since the days of the Medes and the Persians which does not find it necessary to repeal and alter its laws? This process forms a large part of the everyday work of every legislature, and in Great Britain we have a permanent Statute Law Revision

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[1] It is worth noting that in 1882 the Swiss Federal Court in dealing with the doctrine in the course of a dispute between Lucerne and Argovie mentioned the theory of an implied condition as one of its alternative bases: *Arrêts du Tribunal fédéral suisse*, 1882, Vol. VIII, p. 57. For a survey of some decisions bearing upon the doctrine, see McNair, in Hague Academy's *Recueil des Cours*, 1928, Vol. II, pp. 471–4.

Committee to deal with it in its formal and non-controversial aspect. In so far then as treaties are regarded as legislation, it is essential that international law should develop some rule, or international society some organ, whereby this process can be carried out. It is inconceivable that the codes which the League of Nations is endeavouring to produce at The Hague Conference, which opened in March 1930, upon Nationality, Territorial Waters, and the Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners should be intended to last for all time without amendment.[1]

With regard therefore to true law-making treaties, whether the law they make is general or universal, some means of revision is an essential ingredient in an international society. But it seems to me unlikely that the *rebus sic stantibus* doctrine in its contractual form contains the germ of this means, because, as applied to the two classes of treaties above mentioned, the means required is a legislative function and is not to be deduced from the principles of the law of obligations. An attempt to apply to them the analogy of frustration of contract is not likely to produce useful results. With regard to pure law-making treaties, there can be little doubt that if the movement of piecemeal codification succeeds, the signatory states will sooner or later set up a standing commission of revision, which may perhaps receive power to make minor amendments upon its own responsibility and to prepare and submit major amendments to the signatories for their ratification. This process is already discernible in certain technical spheres.[2] When, however, we turn to the contractual kind of treaties, those which embody bargains between the parties regulating their future conduct, or confer mutual rights of trading or fishing for their

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[1] See the work of the Preparatory Committee discussed by Reeves in *American Journal of International Law*, XXIV (1930), pp. 52–7.

[2] For instance, the Aerial Navigation Convention of 1919 created an International Commission for Air Navigation (upon which each of the signatories has at least one representative and some of them more than one) whose duty it is (*inter alia*) to receive and make proposals for the modification or amendment of the Convention. Modifications of the articles of the Convention themselves require the formal adoption of all the contracting parties, but modifications of the Annexes to the Convention, when assented to by "three-fourths of the total possible votes" require no such adoption and become effective upon notification to all the contracting parties. Again, Article 422 of the Treaty of Versailles enables amendments of the Labour Part of the Treaty to be made by the International Labour Conference subject to ratification "by the states whose representatives compose the Council of the League of Nations and by three-fourths of the Members". Moreover there are a number of non-political International Unions which have power to act by a majority in matters of current administration (see Sayre, *Experiments in International Administration* (1919), pp. 25, 30, 31).

cf ICAO

respective subjects, exterritoriality treaties, treaties creating rights in the nature of servitudes of a non-political nature, we are in the realm of different ideas. It is submitted that it is in the sphere of this kind of treaty that the *rebus sic stantibus* doctrine will find its development on the legal side.

3. LAW-MAKING TREATIES

It will be convenient to divide these treaties into two classes: (*a*) treaties creating Constitutional[1] International Law, and (*b*) treaties creating or declaring ordinary International Law.

(i) *Treaties creating Constitutional International Law.* One of the many objects for which the society of nations employs the treaty is to add to its Constitutional Law. A state can have Constitutional Law before it has a Constitution. England did. The society of states has not yet got a complete Constitution, but it has a great deal of Constitutional Law, both customary and conventional, which may fairly be so described though not universally adopted. The latter branch may be illustrated by the following: Hague Convention I for the Pacific Settlement of International Disputes, the Covenant of the League of Nations, the Statute of the Permanent Court of International Justice, and the Peace Pact of Paris. Together with these treaties which create international organs and general rules, I think we are justified in placing those multilateral treaties which from time to time settle the political affairs of a group of countries in a particularly solemn and semi-dictatorial fashion which likens the arrangement to a governmental act imposed from above upon the parties affected, rather than to a voluntary bargain between them. It seems to me that these constitutional treaties of both kinds create a kind of public law transcending in kind and not merely in degree the ordinary agreements between states.

What evidence is there of the possession, by treaties of these two kinds, of this peculiar juristic quality so as to justify us in placing them in a class by themselves? There are some traces among English text-writers of a recognition of a body of international public law possessing a peculiar sanctity and degree of permanence. Phillimore[2] writes of certain treaties as incorporating

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[1] But for an obvious disadvantage I should prefer to call it International Public Law.

[2] *Op. cit.*, Vol. III, DXXXI (p. 796 in 3rd ed.): "That principle once incorporated . . . revives with Peace, or rather remains unaffected by War waged upon grounds unconnected with it."

"by the common consent, express or tacit, of all states concerned in its assertion and maintenance a great public *principle* (italics his) into the International Code". In the writings of Westlake, although it is believed that he nowhere expressly formulates the doctrine of the existence of an "International Code" or a public law transcending in kind and not merely in degree ordinary agreements between states, there is implicit the notion of the special character of certain treaty stipulations. This is particularly so with regard to treaties establishing the neutralization of a state or of a portion of a state's territory. He speaks of such treaties as "a part of the permanent system of Europe, only liable to be affected by one of those great revolutions which disturb that system at long intervals".[1] Again in discussing transitory or dispositive treaties and the effect of the *rebus sic stantibus* doctrine upon treaties creating servitudes, he speaks of "the Swiss, and European because Swiss, interest secured by the neutrality of Northern Savoy, which we must therefore hold to be obligatory on France as the successor in that region".[2] Later he speaks of the "servitude or easement . . . created in certain districts of Savoy, as a system of permanent neutrality created for the benefit of all Europe".[3] Although there have been several wars involving upon opposite sides some of the parties to the Vienna settlement of 1815, it is never[4] suggested that the neutralization of Switzerland and of certain supporting territory not Swiss has thereby been abrogated.

I suggest that we can detect two practical consequences which flow from the recognition or nascent recognition of this principle. The first is that treaties belonging to this class are not abrogated by the outbreak of war between a large number or all the contracting parties. The second is a tendency for them to produce exceptions to the rule that a treaty cannot confer benefits or impose burdens upon third parties; *pacta tertiis nec nocent nec prosunt.*

(*a*) *Effect of War.* It is not suggested that the outbreak of war—even involving all the parties who sign and ratify or subsequently accede—would abrogate The Hague Conventions issuing from the Conferences of 1899 and 1907. The customary explanation of this fact, namely, that they manifest the obvious intent of the parties that they should exist during war, is inadequate because three of these Hague Conventions (Pacific Settlement, Employment of Force for the Recovery of Contract Debts, and Opening of Hostilities) contain rules applicable to a state of peace. Similarly, no one would, I think, suggest that the continued neutralization of Switzerland rests upon the happy accident that, of the parties guaranteeing it, only Spain, Sweden, and Switzerland herself were not belligerents in the Great War. Moreover, the survival *de jure* since that war of the two treaties guaranteeing the neutralization of Belgium is expressly recognized by the unratified treaty signed by Belgium, France, Great Britain, and Holland, on May 22, 1926, in which it was agreed that Austria, Germany, Hungary, and Russia should be invited to accede.[1]

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[1] *International Law*, 2nd ed., Vol. I, Peace, p. 30.

[2] *Op. cit.*, at pp. 61, 62.

[3] *Op. cit.*, at p. 297.

[4] Amongst the many excuses put forward for the invasion by Germany of Belgium in 1914 (including the *rebus sic stantibus* doctrine) it was never, it is believed, asserted that the Austro-German or the Franco-Prussian War had abrogated the treaty of 1839 which neutralized Belgium.

(*b*) *Pacta tertiis*.[2] Sweden was not a party to the Convention of 1856 between Great Britain, France, and Russia providing for the demilitarization of the Aaland Islands; yet the Committee of Jurists (Larnaude, Struycken, and Huber), appointed by the Council of the League in 1920, describe[3] that Convention as having created "true objective law", as being "a part of European Law", and as bearing "the character of a settlement regulating European interests", so that Sweden by reason of the objective nature of the settlement of 1856 could "as a Power directly interested insist upon compliance with its provisions in so far as the contracting parties have not cancelled it", although she had "no contractual right" under it.

A similar tendency is discernible[4] in the case of treaties which regulate the dedication to the world of some new facility for transit such as a canal or the right of navigation upon a river formerly closed. Thus the Permanent Court in the *Wimbledon* case speaks of the Kiel Canal as having become "an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of *all nations of the world*" (italics mine), although only twenty-eight states were parties to the Treaty of Versailles. Again, referring to the Suez and Panama Canals, it describes them as "illustrations of the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits" (for the purpose of the passage of belligerent men-of-war).

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[1] See Oppenheim, *op. cit.*, Vol. I (4th ed., 1928), § 99.

[2] See McNair in *British Year Book of International Law*, 1925, "So-called State Servitudes," at p. 122.

[3] *League of Nations Official Journal*, Special Supplement No. 3, October 1920, pp. 17, 18.

[4] See, however, Fenwick, *International Law* (1924), p. 338.

(ii) *Treaties creating or declaring ordinary International Law, or pure law-making treaties.* These treaties are now frequently referred to as "legislation", a term which requires some preliminary justification. The society of states has no legislative organ in the strict sense of the term, and the term "international legislation"[1] which is becoming common, though dangerous as tending to obscure the principle of unanimity unless the person using it makes his meaning clear, nevertheless deserves to be retained. Oppenheim[2] justified it on the grounds that "legislation is really nothing more than the conscious creation of law in contrast to the growth of law out of custom", and that conventional international law shares with the internal legislation of a state the characteristic "that in both law is made in a direct, conscious, and purposive manner, in contrast to law that originates in custom".

These treaties, like the first class discussed above, are also multilateral. Some of them have much in common with a group we shall treat separately later, namely treaties which resemble charters of incorporation by bringing into existence a new International Union. For the present we are concerned with treaties creating rules of law which may be called ordinary or private law not concerned with the constitutional relations of the members of the society of states. They are steadily increasing in number. (*a*) In the first place we may mention those which, like the Declaration of Paris and most of The Hague Conventions of 1899 and 1907, contain rules governing the conduct of war. One of the latest is the Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous, or other Gases, and of Bacteriological Methods of Warfare, which has received at least fifteen ratifications. (*b*) Secondly, we may point to the numerous Labour Conventions which have been negotiated by the International Labour Organization and are now in force between the states which have adopted them. They seem to me to be typical *Vereinbarungen*, their object being to secure identical rules upon the topics regulated by them in the different countries which adopt them. I think we may safely say that they are not abrogated by the outbreak of war between some or all of the parties bound by them, and the fact that some of them contain express power for a Government to suspend the operation of their provisions in the event of war or other emergency endangering the national safety[1] points to this conclusion. They are in fact permanent law-making treaties, subject to a right of denunciation after the expiration of ten or five years (as the case may be) from the date of coming into force, and subject to a clause which ensures that at least once every ten years the General Conference of the International Labour Organization shall have the opportunity of considering the question of revision or modification. (*c*) Thirdly, we may point to a group of recent Conventions relating to transit and communications, e.g. the Conventions on Freedom of Transit (1921), Régime of Navigable Waterways of International Concern (1921), International Régime of Maritime Ports (1923), Development of Hydraulic Power affecting more than one State (1923), and extract from them an instructive article, the second half of which seems to declare not only the intentions of the parties but what we should expect to happen even if no such article appeared:

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[1] For instance, see Hudson in *American Journal of International Law*, Vol. XXII (1928), at p. 339.

[2] *Die Zukunft des Völkerrechts* (1911), (translated by J. P. Bate and published by the Carnegie Endowment for International Peace in 1921), § 30.

> "This statute does not prescribe the rights and duties of belligerents and neutrals in time of war. The statute shall, however, continue in force in time of war so far as such rights and duties permit."

The common characteristics of all these groups may be said to be that they are multilateral, they make rules of pure law, and they are intended to be permanent (subject in certain cases to a stipulated right of denunciation). They are centuries and miles removed from the treaty of peace or of alliance or the treaty of commerce bargaining for reciprocal but different advantages.[2]

4. TREATIES AKIN TO CHARTERS OF INCORPORATION

In response to needs resulting from increased international contact the last half century has seen the creation by treaty of a number of permanent international organizations for a variety of non-political purposes. These bodies are called Unions or Commissions or Institutes or by some other term, and we may conveniently describe them as Unions.[3] We are not concerned now with the precise juristic character of these bodies or with the question whether any of them have attained international personality. It suffices for us that the treaties establishing them have the quality of creating more than mere contractual relationships between the parties and more than mere legislative rules binding upon the parties. They create something organic and permanent and they seem therefore to demand recognition as falling into a special category of treaty, though in fact they form a species of the law-making treaty. We may mention as types the Universal Postal Union, founded in 1874, of which at least 83 states, dominions, and colonies are members, the International Union for Protection of Industrial Property, founded in 1883, which has at least 32 members, and the Copyright Union, founded in 1886, which has at least 29 members. A score or more could be mentioned.

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[1] Eight Hours Convention, Article 14 ("war or other emergency"), Night Work of Young Persons in Industry Convention, Article 7 ("serious emergency").

[2] Is any significance to be attached to the word "statute" to describe the system or régime set up by a Convention and used in those above mentioned, in the Protocol establishing the Permanent Court, and elsewhere? I incline to think it indicates an intention to create something permanent, be it rules of law or an international organization; it is legislative rather than contractual.

[3] For a list of the principal Unions, see Oppenheim, *op. cit.*, Vol. I (4th ed., 1928), Appendix B. See also Reinsch, *Public International Unions* (1916); Woolf, *International Government* (1916), pp. 153–78; Sayre, *Experiments in International Administration*

Unions of this character have two characteristics which are noteworthy for our present purpose:

(i) The evidence of facts and the balance of opinion are, I venture to think, in favour of the view that they are not dissolved by a war in which a very large part of their members may be involved, though of course war involves a suspension of intercourse amongst the belligerents and the Union.[1] The fact that prudent draftsmen of treaties of peace take care to stipulate (e.g. Treaty of Versailles, 1919, Articles 283, 286) that the conventions establishing such Unions shall again be applied or "come into effect" does not to my mind militate against this view.

(ii) A second consideration of interest to us is that the constitution of some of these Unions contains machinery which avoids "as a matter of practical administration" the necessity of the unanimity of the signatories in many of their operations.[2] Therein again these Unions remind us of the corporations of private law, which, within the limits of the charter or statute which creates

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(1919). See also Rapisardi-Mirabelli, "Théorie Générale des Unions Internationales" in Hague Academy's *Recueil des Cours*, 1925, Vol. II, pp. 345–90.

[1] See Ladas, *The International Protection of Industrial Property* (1929), p. 727; Reinsch, *Public International Unions* (1916), pp. 173–5. For instance, the Supreme Court of Hamburg decided in the case of *Ricordi* v. *Benjamin* that a Copyright Convention of June 1884, to which only Germany and Italy were parties, was abrogated by the outbreak of war between them, but that the Berne Copyright Convention of September 9, 1886, establishing the Copyright Union, of which many neutral states were members, was not abrogated as between Germany and Italy.

[2] See Sayre, *Experiments in International Administration* (1919), pp. 25, 30, 31. See also the case of the International Commission for Air Navigation created by the Convention of 1919 for the Regulation of Aerial Navigation, Art. 34.

them, may perform most of their functions by the vote of a majority of their members.

CONCLUSION

There is good reason to think that in the near future many more disputes arising upon treaties will be referred to the decision of international tribunals than has been the case in the past. My submission is that the task of deciding these disputes will be made easier if we free ourselves from the traditional notion that the instrument known as the treaty is governed by a single set of rules, however inadequate, and set ourselves to study the greatly differing legal character of the several kinds of treaties and to frame rules appropriate to the character of each kind. The few pieces of evidence which I have brought together seem to me to justify this submission.

THE GENERAL ACT OF GENEVA, 1928

By PROFESSOR J. L. BRIERLY, O.B.E., M.A., B.C.L., Chichele Professor of International Law and Diplomacy at Oxford; Associé de l'Institut de Droit International.

THE General Act for the pacific settlement of international disputes, which was the work of the Ninth Assembly of the League, is an important document upon which the British Government must presumably declare a definite policy in the near future, but it has hitherto received little notice in this country. It has been commended to us as the logical implementing of the Peace Pact of Paris,[1] on the ground that the Pact, though declaring that the settlement of disputes is never to be sought except by pacific means, does not contain any positive obligation to resort to those means, and does not set up any machinery for states that desire to do so; the "pacific means" must, therefore, it is assumed, be provided. But this view misrepresents by implication the existing international legal situation. The Pact of Paris is not a first step towards the legal organization of peace for states which already live under the Covenant and the Statute of the Court, and new proposals for a machinery of international settlement ought to be judged according as they mark an advance or a retrogression in relation to the organization that we already have in being. The uncritical assumption that every change proposed at Geneva must necessarily be a change for the better is a poor tribute to the work of the last ten years.

The Act consists of chapters on Conciliation, Judicial Settlement, Arbitration, and General Provisions. Accession may be (*a*) to all the provisions of the Act; (*b*) to those relating to Conciliation and Judicial Settlement only; or (*c*) to those relating to Conciliation only (Article 38). Accession may also be conditional upon certain reservations, which are "exhaustively enumerated" as follows:

"(*a*) disputes arising out of facts prior to the accession either of the party making the reservation or of any other party with whom the said party may have a dispute;

(*b*) disputes concerning questions which by international law are solely within the domestic jurisdiction of states;

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[1] e.g. in a leaflet, No. 261, issued by the League of Nations Union.

(*c*) disputes concerning particular cases or clearly specified subject-matters, such as territorial status, or disputes falling within clearly specified categories." (Article 39 (2)).

The reservations of a party who has acceded to the provisions relating to judicial settlement or arbitration are not to apply to the conciliation procedure, unless expressly stated (Article 39 (4).) Disputes relating to the interpretation or application of the Act, including those concerning the classification of disputes and the scope of reservations, are to be submitted to the Permanent Court (Article 41).

It is not proposed in this article to make a detailed examination of the text of the Act, but rather to inquire whether the principles upon which it has been framed are such as to make it desirable for Great Britain to accept it with or without any amendments that it might be possible to secure. Unless the scheme is sound in principle, it is useless to consider minor points of criticism. It is convenient to consider the provisions relating to Conciliation, to Judicial Procedure, and to Arbitration, separately.

Conciliation.

The procedure follows in substance the plan of Conciliation Commissions which the Locarno and other treaties have made familiar. A "permanent" commission must be set up on a request being made to that effect by one contracting party to another, and its composition, procedure, &c. are provided for in detail. It is also provided that if no permanent commission exists when a dispute breaks out, a "special" commission shall be set up. The statement of the functions of the commissions is taken textually from the Locarno treaties. It is declared that disputes of every kind which it has not been possible to settle by diplomacy must, subject to any reservations under Article 39,[1] be submitted to one of these commissions (Article 1); but by a later article (Article 20) disputes in which the parties are in conflict *as to their respective rights* are only to be submitted to conciliation if the parties so agree. Conciliation, therefore, is intended to be a compulsory preliminary to arbitration, but an optional one to judicial settlement.

Such a scheme invites an obvious question: Why, in view of the existence of the conciliation functions of the Council of the League, is this system of a multiplicity of separate conciliation commissions recommended to us at all? If two states prefer to resort to a conciliation commission, they may, as things are, agree to do so by a bilateral treaty or on a particular occasion. But why are all states urged to accept a general obligation to adopt this particular device? What, if any, are the advantages which it offers over the procedure already existing under the Covenant?

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[1] The admission of reservations to an obligation to submit disputes to conciliation seems to be a definitely retrograde suggestion.

It is pertinent to point out that though treaties providing for the setting up of this type of conciliation commission have recently become numerous, we have as yet no single case of such a commission being called upon actually to deal with a dispute, and we can, therefore, only discuss on *a priori* grounds the question whether they are likely to work satisfactorily or not. If we are to multiply them in the wholesale fashion contemplated by the Act and to give them a priority over a tried machinery already existing for the same purpose, we are entitled to ask for reasons. These unfortunately are difficult to discover, for the discussions of the draft seem to have proceeded almost as though this new machinery were going to be set up *in vacuo*.

While the case for the new procedure seems to be a matter for conjecture, it is easy to point to certain clear disadvantages in it. International disputes are fortunately sufficiently rare to make it certain that the meeting of any single commission out of the hundreds that will be required will be only an occasional event. It follows that no commission is ever likely to acquire experience of its work; its members will always be unaccustomed to their work and unaccustomed to one another; they can never develop a technique, or acquire a sense of corporate responsibility; their names can never win public confidence as being those of men to whom national interests can safely be confided, for in all probability they will hardly be known outside a narrowly specialized circle.[1] Though they may be called a "permanent" commission, they will in fact have no real permanence for they form no part of any standing organization.

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[1] Sir Anton Bertram, in an unpublished memorandum from which he permits me to quote, points out that supposing fifty states accede to the Act, each might have to establish forty-nine commissions, and he submits "that the whole proposal is impracticable. No doubt it follows the Locarno precedent. But whatever may have been done since the treaty by the Locarno Powers (and it is a significant circumstance that no one in fact knows what actually *has* been done, or could give the names of any conciliators who may have been appointed) it is not the least likely that these permanent boards of conciliators would in fact be appointed. It is the kind of thing that people forget to do." Of the procedure for appointing the commissions, which in a certain eventuality may involve choosing the members by lot, he says truly that "it is impossible to conceive a procedure more repugnant to our own ideas. The British public does not know these continental personages, elder statesmen, *viri pietate graves*, who are supposed to be specially qualified as conciliators. It has not heard their names, and would have no confidence in their findings."

In all these respects the Council of the League has a marked superiority. Its members meet regularly; they work together in a variety of tasks besides that of conciliation; they acquire a sense of responsibility both to one another and to the world at large; they have an efficient and permanent Secretariat to assist, and a watchful Assembly to criticize them. Above all they stand for the fundamental principle—the establishment of which is one of the great achievements of the last ten years—that the dispute of any two states is the concern of all, and not of the disputing parties alone.

With these advantages on the side of the Council, can we conjecture why it should be proposed to diminish its rôle in the matter of international disputes? It is believed that the proposal springs from a certain distrust of the *political* character of the Council, which is supposed to deflect its action in such cases. Since specific charges are rarely formulated, it is difficult to refute this criticism, but there are certain things that may be said about it. In the first place, even if you distrust cobblers, there is something to be said for employing them to manipulate a last, and we ought not to lose sight of the fact that the function of conciliation is essentially a political work. Its success depends on the balancing of interests rather than on the determination of rights, and political tact and general experience of affairs are qualities even more necessary than judicial fairness, though there is no reason why even a politician should not possess both. That the procedure of conciliation should be assimilated as far as possible to judicial procedure is an ideal which would rob the former of its peculiar value. In the second place, even if we take the lowest view of a politician's motives when the interests of his own country are at stake, in the situations with which we are here concerned it is with the interests of other countries that he is dealing; on such occasions the paramount interest of his own country is almost always that the dispute should be settled to the satisfaction of both parties before other states become involved in it, and this is exactly the purpose appropriate to a conciliator. In the third place, this suspicion of the Council seems to be based on an *a priori* distrust of politicians in general instead of on an examination of the way in which the members of the Council actually do their work. The Council as a whole does not as a rule act as a conciliation commission. It is too large and too busy, and it knows that there are better ways of doing that part of its work. The extraordinary variety of the methods of action at the disposal of the Council in its work of conciliation has recently been revealed by Mr. Conwell-Evans's examination in his book on *The League Council in Action*.[1] He shows the enormous importance of the fact that the Council as a conciliator is able to dispose of all the resources of the Council as a constitutional body meeting in regular session. If, for example, a quasi-judicial procedure appears more appropriate than pure conciliation to a particular dispute, the Council may ask for an Advisory Opinion from the Permanent Court;[2] or it may decide to appoint a Commission of Inquiry, choosing as commissioners persons who are especially suited to the particular task of investigation, and asking them to propose a solution on the basis of facts to be ascertained on the spot;[3] or it may delegate to a committee of its own members, or to a single *rapporteur*, the task of endeavouring to bring the parties to an agreed solution.[4] Further, there is no reason why in any particular dispute, if a special conciliation commission should appear to be a promising course, the Council should not set one up. Moreover, it can adopt any of these courses while at the same time, by its authority as the executive organ of the League, maintaining a firm hold on a critical situation and taking emergency measures to prevent it leading to war. Not one of these facilities would be open to a conciliation commission formed under the Act.

No doubt it is true that the system of the General Act would not actually deprive the Council of any of the powers that it holds under the Covenant; those powers would remain in reserve for use when the procedure of the General Act had been tried and failed. But the conception of the Council as a tribunal of final resort is unfortunate; it sacrifices the valuable potentialities of the pivotal position that the Council has come to occupy in the organization of peace. The work of the Council is more like the work of a staff than that of any court, appellate or other; to succeed it must be able to watch the development of a dispute at

[1] Oxford University Press, 1929. "The survey", he concludes (p. 243), "reveals a mediatory system which is something organic and living, adaptable to every kind of dispute which the ever varying circumstances of international life may throw up, a system whose freedom and elasticity could only be provided by a body possessing the authority of the Council as the executive instrument of governments, with powers and a constitution of its own, as opposed to an *ad hoc* tribunal brought into being merely for the purposes of a particular dispute, and not possessing any powers in its own right."

[2] e.g. in the Tunis Nationality Decrees dispute.

[3] e.g. in the Mosul dispute.

[4] e.g. in the Hungarian Optants dispute.

every stage, to direct the tactics of the search for a settlement, and—most essential—to change them at need. Time is often of the essence of the matter in an international dispute, and dangerous situations will not stand still while we pass them through the successive stages of an inelastic prearranged procedure of appeasement. We cannot afford to hold our most effective instrument in reserve until the matter may have become desperate.

Judicial Settlement.

The second chapter of the Act calls for little remark. "All disputes with regard to which the parties are in conflict as to their respective rights" are to be submitted to the Permanent Court, unless the parties agree to resort to an arbitral tribunal instead. The obligation is subject to any reservations made under Article 39.

This seems merely to do in other words what the Statute of the Court has already done by the Optional Clause. But the change of form is confusing and inconvenient, and it is difficult to see any argument in favour of having two alternative ways of conferring compulsory jurisdiction on the Court. What, for instance, is to be the relation of a state which has chosen one way to a state which has chosen the other? Further, a positive objection to this part of the Act is that the permissible reservations are limited to those specified in Article 39, so that for states which have already accepted the Optional Clause with reservations the practical effect of accepting this part of the Act would apparently be to abrogate such of their reservations as do not happen to be included in Article 39; e.g. the existing British reservation of the right to suspend proceedings pending reference to the Council.

Arbitration.

Chapter III of the General Act contains the provisions relating to Arbitration. Their effect is that any dispute in which the parties are in conflict otherwise than as to their respective rights, which does not, within a month after the termination of the work of the conciliation commission (to which, as already stated, it must first be submitted), form the object of an agreement between them, may be brought before an arbitral tribunal (Article 21). There follow provisions for the constitution of the tribunal and for the settlement of the agreement of reference; but if the agreement is not concluded within three months after the constitution of the tribunal, the dispute may be brought before it on the motion of either party.

The crucial article of this chapter is, however, Article 28, which prescribes the functions of the arbitral tribunal in the following terms:

> "If nothing is laid down in the special agreement or no special agreement has been made, the tribunal shall apply the rules in regard to the substance of the dispute (*les règles de fond*) enumerated in Article 38[1] of the Statute of the Permanent Court of International Justice. In so far as there exists no such rule applicable to the dispute, the tribunal shall decide *ex aequo et bono*."

The effect of the last sentence of this article will be discussed presently, but the primary intention is clear. The tribunal is to apply in the first instance rules of law, and that although, *ex hypothesi*, the disputes with which it is to deal do not arise out of any conflict about legal rights. This is not only the clear effect of the words used; we know that it was also the intention of the draftsmen, as may be seen from the following extracts from the debate in the First Committee of the Assembly.

M. Politis,[2] presenting the report of the subcommittee and referring to Article 28, said:

> "This meant that, if a rule of law existed, it was binding upon the judge, but that, if no rules of law existed, he might decide the matter *ex aequo et bono*.
>
> "M. Politis wished to draw attention to one objection that had been made, because it might be very important in practice. It had been said, that the existence of a rule of law did not make much difference. Supposing there were such a rule, the judge deciding the case in accordance therewith did not settle the dispute. The relations between the parties remained strained.
>
> "It was in view of such a contingency that some members of the First Committee had stated that, even in such a case, the arbitrator should be given the power to decide as a friendly mediator. It had been unanimously recognized in the subcommittee that that would be to authorize the removal of the very basis of international relations. No treaty, not even a treaty of commerce, could continue to exist if one country, complaining of the application of a treaty of commerce by the other contracting party, went before a tribunal, and if that tribunal, after noting that the party to whose action exception had been taken had merely been applying the treaty of commerce, could have the power to alter the treaty and say to the parties, "For the future, your affairs will be settled by such—and—such rules which I will lay down". Obviously, in spite of a rule of law which the arbitrator had noted as existing, a dispute might continue on the plane of interests; if relations continued to be strained, only one course remained open, namely, to seize the Council, whether in virtue of Article 11 or in virtue of Article 15 of the Covenant."

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[1] i.e. (1) international conventions; (2) international custom; (3) the general principles of law recognized by civilized nations; (4) judicial decisions and the teachings of publicists.

[2] *Official Journal, Special Supplement*, No. 65, p. 62.

M. Undén[1] (Sweden) said:

"The discussion in the subcommittee had revealed a difference of opinion as to the meaning of the provision conferring on an arbitral tribunal the power to take decisions *ex aequo et bono*, or in the capacity of friendly mediator, in the case of non-legal disputes.

"No doubt there did exist arbitration treaties which contained similar clauses and which, giving effect to the intentions of the two parties, conferred on a tribunal an even wider power than was vested in the Council of the League of Nations by the Covenant. Nevertheless, the committee was not now concerned with the interpretation of the existing arbitration treaties, but with the drafting of a new convention. They had confined themselves to amending the wording of Article 28 so as to indicate better that the arbitral tribunal was bound by the rules of law in force at the time, which meant that it must not regard itself as authorized to revise existing treaties.

"But even so, it was still difficult to determine the exact meaning of the rule dealing with the right of a tribunal to decide *ex aequo et bono*. In the draft before the committee, that rule was specially intended to cover cases where existing international law furnished no rules for a solution of the question referred to the tribunal.

"Again, questions which, under Article 15, paragraph 8, of the Covenant, were to be considered as falling within the exclusive jurisdiction of the parties might none the less form the subject of a decision *ex aequo et bono*. On the other hand, however, a state might, under Article 37,[2] by means of a reservation, exclude such questions from the sphere of arbitration."

Dr. von Simson[3] (Germany) said:

"Reference had been made during the latter part of the discussion to Article 28. One general remark was necessary here. The General Act might be considered essentially as an attempt to cover all the possibilities of arbitral procedure: this was evident from the very text of Article 21 of Chapter III, which dealt with non-legal disputes without exception.

"Article 28, however, which gave the rules on which the tribunal must base its decision, showed that there were certain disputes that remained outside the scope of that entire procedure. The subcommittee had been led to word Article 28 in such a way that, even in non-legal disputes, the tribunal would apply the rules of substance indicated in Article 38 of the Statute of the Court, and that it would only be able to decide *ex aequo et bono* if there did not exist any such rules applicable to the disputes in question.

"It was clear that there might arise disputes which were due precisely to the existence of a legal position which could not as such be questioned. Such disputes could not be solved by the application of Article 28; that being so—and it seemed to be the view of M. Politis—the procedures laid down in the Covenant, as for instance that under Article 15, would accordingly remain applicable even if the two parties might have adhered to the General Act in its entirety.

"It might therefore be said that the General Act did not embrace every imaginable category of dispute. He did not mean to say that this was a flaw, for it would be difficult in an instrument dealing exclusively with judicial and arbitral procedures to establish detailed rules in regard to those disputes to which he had been referring. This point, however, should be noted."

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[1] *Ibid.*, p. 76.

[2] Article 39 in the final draft.

[3] *Ibid.*, p. 77.

It is not surprising that M. Undén should have been in some doubt as to the meaning of the last sentence of Article 28, which gives the tribunal power to decide *ex aequo et bono* "in so far as there exists no such rule (*sc.* no rule of law) applicable to the dispute", for the meaning is extremely obscure; it is also, clearly, of extreme importance. An earlier draft of the article had the phrase: "in so far as the dispute cannot be settled by the application of the rules of law alone, the tribunal may exercise the functions of a friendly mediator", but M. Politis[1] tells us that this formula was objected to:

> "It had in some quarters been regarded as lacking in precision and even as inaccurate. Reference had been made to the final provision of the Statute of the Court, where it was laid down that the Court might, if the parties agreed, decide *ex aequo et bono*. The subcommittee had been asked to keep as closely as possible to the Statute of the Court. It had accordingly adopted the following words."

It is difficult to follow here the sequence of the subcommittee's thought, and to understand why, in trying to follow a form which says that the tribunal may decide *ex aequo et bono*, "*if the parties agree*", they should produce a form which says that it may do so "*in so far as no such rules* (sc. *of law*) *applicable to the dispute are in existence*". The two contingencies are entirely different, and while that adopted in the Statute of the Court is clear and workable, the other is, it is submitted, unintelligible.

The article seems to assume that international law is nothing but the sum total of a finite number of rules, for only so can the last sentence have any operation. Such a view of the system is no doubt the logical outcome of positivism, which ought, if it is consistent, to admit no proposition as law unless the consent of states to it can be shown, and the number of propositions for which this can be done is necessarily limited. But it is also, it is submitted, the *reductio ad absurdum* of a purely positivist position, for the reason that it would make the *application* of law by a court to practically any concrete set of facts impossible.[2] It is particularly curious to find this view accepted in an article which incorporates by reference Article 38 of the Statute of the Court, for Article 38 is itself a signal rejection of the positivist view. No doubt when we are considering the problem of developing the law so as to make it more responsive to the international needs of the present, we are accustomed to describe it as an "imperfect" system, or to say that there are in it many "lacunae" or "gaps" which it is desirable to "fill". But what do we really mean by these metaphors? Not, surely, that it is possible for a state of facts to arise between states in regard to which a court of international law would be unable, if appealed to, to declare the legal position? That a court might have to declare itself non-competent because the system has not supplied it with an "applicable" rule? That contingency seems indeed to be frankly contemplated in this article, and it is one that a purely positivist view should be prepared to face. Yet we know that it does not arise in international litigation, any more than it arises in an English court. There is a sense in which English law too contains "gaps"; it would be pedantic, for example, for the lawyer to explain to the indignant owner of a car, when he finds that our criminal law gives him no redress for the "borrowing" of it by a casual joy-rider, that here is no "gap" in the law, no unfilled space among the "rules" of which he probably supposes the system to consist. But it would, of course, be true. Surely when we speak of "gaps" in the law, international or municipal, we are using a tendencious metaphor appropriate to critics, but not one of the jurist's terms of art. We are thinking of contingencies in which we know that the only answer a court can give to a complainant state or individual is that his grievance constitutes, as the law stands, no cause of action. We do not mean that the law has *no* rule for these contingencies, but merely that we do not like the rule that the law directs the court to apply. It is only so long as we think of law as petrified, so to speak, in a large but limited number of specific rules, that we are likely to be misled by these spatial metaphors; law *in action* always connotes the formulation of a grievance in the shape of a claim for redress from a court, the formulation of some specific "cause of action", and a court of law can always declare whether an alleged cause of action is or is not well founded in law. In either case it applies a "rule" which is "applicable to the dispute".[1]

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[1] *Ibid.*, p. 62.

[2] Cf. Lauterpacht, *Private Law Sources and Analogies of International Law*, e.g. at p. 31 and following pages.

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[1] Substantially the same position on the subject of "gaps" in the legal system is taken by Sir John Fischer Williams. See his *Chapters on Current International Law*, pp. 49 *et seq.* See also an article by Max Radin, *The Permanent Problems of the Law*, in Cornell Law Quarterly Review, Vol. XV, p. 15; "If he (the judge) shuts his eyes and averts his face and cries out that he will not judge, he has already judged. He has declared it to be lawful by not declaring it unlawful. There is nothing legally indifferent, nothing indeterminate."

If this reasoning is sound, it means that the contingency upon which the last sentence of Article 28 is to come into operation can never occur. M. Undén, indeed, in the passage cited above, seems to have thought that the words would allow the tribunal to decide *ex aequo et bono* a dispute arising out of a matter of domestic jurisdiction, in the absence of an express reservation of such disputes from the operation of the Act. This is a startling suggestion, and I do not myself see how it can be correct. Can it be intended that the tribunal should hold that there exists no rule "applicable to the dispute" merely because it sees reason to think that the rule which the law would direct it to apply will not, as things are, produce a real settlement of the dispute? It is a mistake, I think, to say that international law has *no* rule for matters of domestic jurisdiction; its rule is that they *are* matters of domestic jurisdiction. On the other hand, if M. Undén's suggestion is well-founded, it would open up a different line of criticism against the Act of which I shall say something later. But for the present I shall consider the scheme on the assumption that it must result in directing the arbitral tribunal to apply the law to every dispute before it.

It can hardly be contended—certainly the members of the subcommittee cited above did not contend—that a dispute not relating to legal rights can be "settled" in this way. It is likely, as M. Politis said, to "continue on the plane of interests", which is, unfortunately, apt to be a more dangerous plane than that of law. The General Act is not therefore an all-inclusive scheme for the settlement of international disputes, though the notion that it is, is probably the reason for whatever support it has received. But if these disputes are not to be "settled" by the procedure proposed, what are we to regard as the object of submitting them to it? In some way, it would seem, it must be supposed that a declaration of the legal rights of the parties will at least facilitate a settlement, but is this its probable effect? This is a controversial question to which a dogmatic answer would be out of place; probably, indeed, the answer should not be the same in all cases. If, for example, there is real doubt what the legal position is, it may be desirable that the doubt should be resolved before other action towards a settlement is taken. But the legal position is often quite clear in this class of dispute; it is so, for example, in a dispute in which one party demands the revision of a treaty, or the alteration of a frontier, or complains of the action of the other in some matter within that other's domestic jurisdiction, e.g. immigration or tariffs. In such cases it is difficult to see any possible purpose in the compulsory reference of the dispute to an arbitral tribunal administering rules of law. Yet the scheme of the Act admits no differentiation; it prescribes a uniform procedure for all disputes not relating to legal rights, as though the differences between them were unlikely to have any particular relevance to the appropriate method or methods of settling them.

Support has been sought for the plan of requiring a declaration of the legal rights of the disputing parties as a necessary first step, even where the nature of the dispute makes it probable that the eventual settlement will involve a modification of existing rights, from our treatment of the analogous problem within the state. Parliament, it is said, may modify existing legal rights when a decision of the courts has shown that the law is unjust, as in the famous Scottish Church case; it does not modify them before the courts have spoken. But the analogy breaks down. Parliament does not insist on a resort to the courts when the existing law is clear, as it normally is in the political or economic disputes of parties and classes, which are our nearest counterpart within the state to the non-legal disputes of states; it does not, for example, send the miners to a court of law before it legislates for the length of their working day. Further, even if it were true that the legislative settlement of a dispute inside the state is generally withheld until the existing law has been formally declared by a court, the utterly different conditions of international and national legislation would make the analogy a dangerous one to follow. To give one of two disputing states a formal declaration that it is legally justified in the position it has taken up is to strengthen its position enormously against a claim by the other for a modification of rights.[1] It is not suggested that international legal rights ought lightly to be set aside; there is and there always should be a presumption favouring the state whose cause has the sanction of existing law. But in the present state of international organization we need no new safeguards against that danger. The real danger is exactly the reverse, that the system is too little responsive to the need for change, and the effect of the procedure here suggested, perhaps the not unintended effect, could only be to make it less responsive still. "It may be conjectured", writes Sir John Fischer Williams, referring particularly to Article 28, "that the acceptance of this General Act as a whole will commend itself mainly if not solely to those states who do not expect at any time to be asking for a legislative change in the existing state of things, and who are now, and expect indefinitely to be, contented with the *status quo*."[1]

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[1] Incidentally the probable effect on the efforts at conciliation, which, under the plan of the General Act, must precede the stage of arbitration, should be considered. A state which knows that it has only to hold out long enough to have its legal rights established, and which happens to be satisfied with those rights, has little motive to be conciliatory in the preliminary procedure.

So far I have assumed that, in spite of the concluding words of Article 28, the arbitral tribunals of the General Act will be unable to exercise the power of deciding *ex aequo et bono*, which it was apparently intended (though within what limits is not clear) to confer upon them, for the reason that the contingency upon which the words are to take effect is one that cannot arise. But if this view of the effect of the article is wrong, and the concluding words *are* capable of taking effect, for example, in cases such as those suggested by M. Undén, the objection, though different, would be, if anything, even more serious. M. Politis stated the objection clearly enough, and it was evidently felt equally by the other members of the subcommittee, when he said that to give an arbitrator power "to decide as a friendly mediator" would be "to authorize the removal of the very basis of international relations". Such a plan would indeed introduce a régime of instability for legal rights such as no modern civilized society does or could tolerate; it would substitute for the rule of law the consciences of a small number of supermen responsible to no one. A tribunal with power to decide *ex aequo et bono* is a tribunal with power to abrogate or modify the legal rights of the parties to a dispute, and it is misleading not to admit the true nature of such a power. Essentially it is a power to *legislate*, and the difficulties that surround international legislation are notorious. They are obvious whenever we face the problem *eo nomine*, e.g. when we discuss the possibility of implementing Article 19 of the Covenant; they remain just as real if we avoid the use of the word and try to circumvent them by a system which would authorize an *ad hoc* commission to modify legal rights in controversies that are to be compulsorily brought before it. However right and just it may sometimes be that international legal rights should be modified, that a treaty or a frontier, for example, should be revised, or that a state should be restrained from doing some injurious act that in the present state of the law constitutes no legal wrong, and however proper that we should be exploring the possibilities of a pacific procedure by which these necessary modifications can be made in an orderly way, it is inconceivable that the solution of the problem will be found in the simple plan of handing over to arbitral tribunals a function which we are not yet prepared, even with any safeguards that have yet been suggested, to concede to an international legislature. There may, of course, be cases in which two states agree to accept a variation of their existing legal rights in reference to a particular subject-matter, the details to be decided for them by an impartial tribunal; but a system in which one state could be required, on the mere demand of another, to put in issue its legal rights on any matter about which the two are in controversy would be as unreasonable as it is improbable.

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[1] *Journal of the Royal Institute of International Affairs*, 1928, p. 411.

Any scheme of compulsory arbitration which attempts to be all-inclusive, in the sense of attempting to provide for the final settlement of every possible dispute between states, is confronted with the difficulty of which the framers of Article 28 were evidently acutely aware, when it comes to prescribe a method of settlement for disputes which do not arise out of any conflict regarding legal rights. The difficulty in which the terms of this particular article is involved is not a mere difficulty of drafting; it is inherent in the ideal of an all-inclusive scheme. For such a scheme must adopt one of two alternative plans; it must either direct the arbitral tribunal to decide such disputes according to law, or it must allow them to depart from the law and decide them *ex aequo et bono*, and unfortunately either plan is objectionable. The former does not in any true and final sense settle the dispute, but leaves it "to continue on the plane of interests"; and the choice of it is therefore a virtual admission that the ideal of an all-inclusive scheme has been abandoned in fact, though it may be retained in form. The latter is "to authorize the removal of the very basis of international relations". It may be that of the two alternatives, the General Act has chosen the less objectionable, but that is no reason why we should be required to enter on a course which leads only to a choice so unsatisfactory. Before we do that we ought to examine the assumptions which lead to such an impasse.

I venture to suggest that there are three main assumptions underlying the policy of the General Act. The first seems to be that every dispute is intrinsically capable of being settled. That is not true of the disputes of individuals, and I doubt whether in this particular respect the disputes of states are different. Disputes "on the plane of interests" will always exist, so long as the interests of men or states conflict. The second seems to be that every unsettled dispute necessarily creates a dangerous situation. That is a possible, but only an exceptional, result, and when it does occur the danger must of course be met; but fortunately the

League is rapidly developing a technique for dealing with the danger when, as is usually the case in the more aggravated disputes, an immediate settlement is impossible. The third assumption is, I think, that only in some comprehensive scheme on the lines of the General Act can we hope to find the remedy for that prevalent sense of insecurity, which admittedly is the chief obstacle to disarmament. The Act is the latest of a series of schemes offered to the world in that expectation, but it is unjust to suppose that those who have welcomed the successive rejections of these schemes are either merely obscurantist, or that they lack sympathy with the motives of their authors. Rather they are convinced that this persistent search for a new *juridical* key to the problem of security is misrepresenting its essential nature and concealing the real difficulties. The lawyers have done their part; the mere juridical framework of peace is already constructed, and it is good. It may need occasional amendment; it does *not* need a fundamental reconstruction, such as we are asked, with wearisome iteration, to undertake. The key to the problem of security lies elsewhere—in policies and not in law—and it would not be difficult to find it. But the lock is not an easy one to turn.

THE ABSENCE OF AN INTERNATIONAL LEGISLATURE AND THE COMPULSORY JURISDICTION OF INTERNATIONAL TRIBUNALS

By H. LAUTERPACHT, LL.D.

I

The Absence of an International Legislature.

In the last fifty years international lawyers have been questioning, on several grounds, both the possibility and the desirability of the obligatory settlement of international disputes. Various reasons have been assigned for what has been believed to be the inherent unsuitability for obligatory judicial settlement of all or certain classes of controversies. According to some the reason for it may lie in the absence of clear and ascertainable rules of international law applicable to the actual dispute; in the opinion of others, the political nature of controversies as involving matters of vital importance may make them unfit for obligatory judicial settlement; others still attach decisive importance to the existence of disputes in which the subject-matter of the controversy is not a legal right but a so-called conflict of interests with the effect that the very form in which the claim is put forward may render it unsuitable for judicial settlement. It is not intended to discuss in this article the notion of non-justiciability as based on any of these objections. Its purpose is to consider a somewhat novel reason for or test of non-justiciability of international disputes, namely, the objection based on the fact that there is no international legislature capable of modifying and supplementing existing law. The adherents of this view point to the possibility of controversies in which the decisions of an international organ, acting judicially and giving, as it is bound to do, effect to an undoubted international right, would be so manifestly unjust and so little in accord with the changes continuously taking place in the international society that, far from being a positive factor in the peaceful settlement of international disputes, they would have the unavoidable effect of perpetuating injustice and friction. In their view the existence of the obligation of judicial settlement in issues of this description must cause the interested states to adopt a rigid attitude of reliance on formal rights, an attitude which they might possibly be induced to abandon or to modify in the course of a procedure of a less rigid nature. The upholders of this view look with impatience on those who regard judicial settlement as a panacea which will secure peace and solve international conflicts, and insist that real progress in this direction can be achieved only by admitting the essential non-justiciability of such disputes and by developing so-called alternative methods of settling them through the more appropriate political procedure of international conferences, conciliation, and international legislation.

This attitude of caution was first adopted by Westlake in the well-known article in which he discussed the limitations of international arbitration. He was inclined to recognize the right of political action, to the exclusion of the duty to arbitrate, not only when there is no legal rule in existence or when the existing rule is in need of being supplemented or more precisely defined, but also in cases where the legal aspect is clear, but is over-ridden by considerations of higher distributive justice, namely, when "opinion is felt to be outgrowing a rule, so that a change in the law may be asserted in good conscience to be necessary, and yet, from the want of an international legislature, it is difficult to effect such change otherwise than by setting an example to it."[1]

However, it was after the World War that this view was given clear expression by a number of writers and statesmen of authority. Professor Huber, when discussing in 1920 the bases of the Covenant of the League of Nations and its provisions in regard to judicial settlement, drew attention to the essential difference, in this respect, between international and municipal law, inasmuch as "the latter possesses in its legislature a regulative organ which normally ensures the adaptation of the law to the changes of conditions of power within society, whereas the essentially contractual nature of the relations of independent states enables states interested in the maintenance of the *status quo* to prevent or to obstruct the evolution of the law".[2]

At the first Assembly of the League of Nations, during the discussion on the inclusion of the principle of obligatory arbitration in the Statute of the Permanent Court of International Justice, Lord Balfour gave eloquent utterance to similar doubts. He said:

> "Remember that this Court is set up to administer a system of international law. International law itself is a changing and growing subject. There is no

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[1] *International Law*, 2nd ed., Vol. I, p. 301.

[2] *Zeitschrift für Völkerrecht*, XII (1923), p. 14, and *Annuaire de l'Institut de Droit International*, XXXIII (2), pp. 763, 764.

> provision—fortunately perhaps—within the limits of the Covenant for changing and reforming international law, and this Court is brought into existence not to change it or reform it, but simply to administer it. Therefore you may find yourselves, or some nation in the course of time may find itself, in the position that a rigid interpretation of what may be an antiquated system of international law, which would never be embodied in any authoritative code or authoritative work if all the circumstances were understood, nevertheless has to be administered by a Court which, in administering it with strict regard to law with which it has to deal, but without any power of showing that larger vision which is sometimes given to statesmen and politicians, may affect interests so profoundly concerning the very existence of that state, that your whole machine would be destroyed before that state would submit itself voluntarily to legal destruction.
>
> "I do not think such cases are likely, but who among you will venture to say that they are impossible? . . .
>
> "The very thought that it might occur will throw discredit on your system, unless you allow some possible safety valve."[1]

This safety valve was found in the rejection of obligatory arbitration.

When in 1922 the Institute of International Law discussed the problem of the obligatory jurisdiction of international tribunals, Professors Politis and Brown submitted a report in which they envisaged the possibility of disputes not suitable for judicial settlement on the ground that they could not be decided without taking into account general principles of justice and equity. It was clear from the report and from the discussion that such a possibility was regarded as the direct outcome of the absence of an international legislature able to develop the existing law in the spirit of justice and progress.[2] In this country Professor Brierly has given, as one of the reasons militating against the acceptance of the obligations of compulsory arbitration, the fact that international law lacks the safeguard possessed by municipal law, namely that decisions of courts "may be corrected and the law brought into harmony with public opinion by the legislature."[3] Sir John Fischer Williams, without assuming a negative attitude in regard to obligatory judicial settlement, has raised the same difficulty in an admirable article on "The Place of Law in International Affairs."[4] Finally, the same problem constitutes the reason for the retention of the conception of non-justiciability in some of the best recent contributions to the subject, in particular in those by Hostie,[1] Morgenthau,[2] Schindler,[3] and Decencière-Ferrandière.[4]

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[1] *Documents concerning the Action by the Council of the League under Article* 14 *of the Covenant*, p. 247; *First Assembly, Plenary Meetings*, p. 488.

[2] *Annuaire de l'Institut de Droit International* Vol. XXIX, pp. 23–58.

[3] *The Law of Nations* (1928), p. 189.

[4] *Chapters on Current International Law and the League of Nations* (1929), pp. 34, 35.

There are weighty reasons which impose upon the international lawyer the duty of a careful examination of this new argument against compulsory judicial settlement among nations. The persistency with which successive writers in the last decade have drawn attention to this side of obligatory arbitration, far from indicating any lack of originality on their part, is expressive of the ever-present actuality of the problem. Their opposition is free from the drawbacks, legal and logical, from which the other tests of justiciability suffer as based on the non-existence of legal rules or on the importance of the subject of the dispute, or on the existence, in the sphere of law, of so-called conflicts of interest. Neither is its case weakened by appeals to questionable claims of state sovereignty and to its independence of the law. It is raised in the very interest of justice and peace between nations—although some may regard it as a startling revelation that forty years after the inception of the movement for obligatory arbitration international lawyers discover that the consummation of these efforts may in the present state of international organization prove disastrous to the peace of the world. There should be little doubt as to the gravity of the implications of the objections as put forward by these writers. As it is impossible to determine in advance in what disputes a legal decision may prove fraught with danger, their attitude amounts in fact to a comprehensive rejection of the idea of obligatory arbitration. This rejection includes even so-called purely legal disputes as connoting controversies capable of determination by an existing rule of law; in fact compulsory arbitration of legal disputes so conceived is even more dangerous from the point of view of the objection put forward. The problem raised by the absence of an international legislature has now become and is the central problem of obligatory arbitration, and whatever may be the nature of their conclusions, the service which those who have brought it to the forefront of discussion have rendered to the cause of international law cannot be overestimated. Their diagnosis of the evil, however exaggerated, is a correct one, and its correctness is not impaired by the sweeping thoroughness of the cure consisting in the rejection of obligatory arbitration.

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[1] "Différends justiciables et non-justiciables" in *Revue de droit international et de législation comparée*, 3rd ser. Vol. IX (1928), pp. 263–81, 568–87.

[2] *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen* (1929).

[3] *In* Académie de droit international, *Recueil des Cours*, 1928, V, pp. 264–79.

[4] *Revue générale de droit international public*, Vol. XXXVI (1929), pp. 416–51.

The purely negative character of the conclusions which as a rule are drawn from the fact of the absence of an effective international legislature is frequently concealed behind the thick veil of the advocacy of so-called alternative means of settlement and of the possibilities of international legislation. The purpose of this article is therefore a twofold one: We shall, first, examine how far these alternative means can be regarded as a satisfactory substitute for obligatory judicial settlement; secondly, we shall consider what are the existing and proposed remedies of a legal or political nature calculated to obviate the inconveniences and dangers resulting from the absence of an international legislature. The view will be put forward that the latter factor, although calling for a consideration of certain remedies in the judicial and political sphere of international organization, is at the same time a powerful factor in favour of obligatory judicial settlement.

II

The Alternative Means of Settlement.

(*a*) *International Conciliation.* In regard to conciliation (which for the sake of brevity is here meant to cover the procedure of negotiation, of commissions of inquiry, and of international conferences), it is important to realize at the very outset that the practical consequence of the alternative means is not to substitute one mode of peaceful settlement for another of equal force and value. The effect is to substitute a series of attempts at settlement for a settlement proper.

This is not said with the intention of minimizing the part which the alternative means may legitimately play in the preservation of peace and in the adjustment of international controversies. It is true that, apart from the activities of the Council of the League of Nations, the function of conciliation has so far been negligible in practice, but its possible advantages have been widely discussed by international lawyers and others. In theory it serves a large variety of useful purposes. It brings the parties together; through the moratorium, it prevents sudden breaches of the peace; through the elimination of recourse to rigid law, it spreads the allaying oil of sweet reasonableness over the waves of the controversy; it is marked by simplicity and the absence of cumbrous and costly procedure; it may have the advantage of the services of experts; and as its findings are not binding in any case, it makes possible the conclusion of treaties of pacific settlement without indefinite and therefore destructive reservations.

Nevertheless, whatever the advantages of conciliation may be, it is clear that, unlike compulsory judicial settlement, it does not aim at securing peace within the international society by ascertaining in a final and binding manner the disputed rights. This is, of course, not the only task of judicial settlement, but it is its primary task, a function which is essential to the existence of a community under the reign of law.

To be sure, there is no certainty of a physical law attaching to this peace-preserving function of judicial settlement. Like any other provision of positive law, so also may a binding judicial pronouncement be disregarded. Thus viewed, the difference between the two processes of settlement is only a relative one, and any doubt whether judicial settlement is an absolute guarantee of peace is directed against a view which no one holds and which on the face of it is impossible to maintain. But the difference exists nevertheless, and is of fundamental importance. In law, the binding decision of an international court constitutes a final settlement, in the sense that it precludes recourse to such forms of self-help as may be otherwise permitted in an undeveloped system of law. Politically, resort to self-help is still possible, just as disregard of the law and revolution are possible within the state, but legally they amount to a defiance of and a breach of the rule of law, with all the political consequences of such an attitude. The moral and political effect of the decision of a judicial tribunal is so tremendous that its legal finality has a tendency to approach actual finality. A state may disregard the finding of the conciliator without exposing itself to the charge of bad faith, but a state refusing to accept the award of a judicial tribunal is in a different position, and the most embarrassing burden of the questionable proof of excess of jurisdiction or of corruption on the part of the court is thrown upon it if it wishes to escape the odium of appearing as the law breaker. As mentioned, no such restriction of freedom of action attaches to the procedure of conciliation. It leaves open the enforcement of claims by violence, not only as a political but also as a legal possibility. The fact that states have renounced resort to war does not necessarily alter the possible consequences of the purely optional and provisional character of conciliation procedure. For, firstly, the absence of the obligation to submit to a final judicial pronouncement, when coupled with the duty not to resort to war, amounts in practice to enabling the state which has committed a wrong or is in wrongful possession to defy the law without the illegality of its conduct being impartially ascertained, and this fact alone may prove a menace to peace. Secondly, the question arises whether the continued existence of a situation believed by one party to be contrary to law—a position aggravated by the refusal of the opponent to have the disputed legal rights ascertained by a judicial pronouncement—may not give rise to a claim to have the alleged wrong removed by recourse to force in self-defence, apparently sanctioned in all commitments limiting or abolishing the right of war.

At the risk of some repetition it must be pointed out that the object of these remarks is not to dispute the possible usefulness of conciliation as an agency in securing peaceful adjustment of controversies. The two methods are not opposed one to another so that the choice of one necessitates the rejection of the other. Even if it is conceded that some of the dangers of judicial settlement resulting from the absence of an international legislature may be obviated by a previous recourse to the procedure of conciliation, may it not be urged that the proper course is to make the recourse to judicial determination dependent upon the previous utilization of the machinery of conciliation, in the same way in which at present in almost all arbitration treaties recourse to an international tribunal is made dependent upon previous diplomatic negotiation? There is little actual justification for the view that the eventual right to demand a judicial decision may render illusory all the advantages of conciliation, inasmuch as a state which believes it has the law on its side and is determined to insist rigidly on its formal right will be disinclined to show that spirit of accommodation and broadminded appreciation of the equitable aspect of the controversy, which is regarded as an essential feature of the procedure of conciliation. This pessimistic estimate lies within the domain of speculation, and it may therefore be difficult to disprove it. The very same problem has arisen in connexion with the compulsory arbitration of industrial disputes, in particular in Australia, where arguments have been put forward in support of the view that the ultimate faculty to invoke the judgment of the arbitration court may frustrate the very purpose of the procedure of conciliation. However, equally weighty reasons have been adduced by those who point out that, unless there is in the background a court endowed with compulsory jurisdiction, little respect is paid to the conciliator.[1] In relations between states there is no reason to assume that a Government which is determined to insist at all costs on its formal rights will be induced to abandon them before a commission of conciliation.

(*b*) *International Legislation.* If the procedure of conciliation offers no satisfactory alternative to judicial settlement, whose peace-preserving function is denied on the ground of the absence of an international legislature, what then is the alternative? Before examining this question it may be useful to inquire how far the establishment of an international legislature, even if practicable at the present stage of international organization, would solve the difficulties said to be inherent in obligatory arbitration. There is no doubt that in some cases it would be in a position to remove dangerous causes of friction by a deliberate change of the legal *status quo.* Its possibilities, however, in this direction must not be exaggerated. The existing legal *status quo* may be a source of friction, but there is no certainty that legislation altering it may not prove even more dangerous to the cause of peace. It may lead to actual recourse to force where formerly only dissatisfaction and friction existed. In so far as it may deprive a state of rights previously enjoyed, it may be regarded as an act of injustice and usurpation of powers, in the same way as legislation within the state, dictated by class or other factional interests, may prove productive of widespread indignation or violent disobedience culminating in revolution. To expect that legislation will always work for peace is as unreasonable as to attach the same expectation to conciliation or judicial settlement. In addition, the scope and the possibilities of legislation are strictly limited on more general grounds. In the first place, legislation is subject to the same limitation as legal regulation in general. It cannot regulate matters which, having regard to the nature and the function of the law, are beyond the sphere of legal regulation; and it must stop short of relations which, although in principle amenable to regulation by law, cannot for the time being become so in practice, having regard to the actual stage of the political and social development of the particular society.

Secondly, its operation is necessarily limited by the fact that some legal relations, although distasteful to those who expect to benefit by a change of the law, ought nevertheless to be maintained because of their conformity with material or formal justice. It is not the function of the law to prevent individual hardship following upon the operation of rules of law. On the contrary, its task is to give effect to legal rights, notwithstanding the inconvenience of those subjected to a legal duty. It is only when such hardship and injury become socially detrimental that the legislator steps in. A change of the law, even if its denial is detrimental to the interests of the person or the group asking for the change, may violate reasonable expectations of others protected by law which are just in themselves; it may be possible of achievement only at the expense of the growth of others, in particular when the object of the claim is such that there is not enough of it to go round. It must not be forgotten that the problem of adjusting the functioning of the law to the perpetual antinomy of change and stability and of justice and security is not peculiar to international law. It is a general legal phenomenon common to every legal society. Experience teaches that in this struggle the element of change is not always victorious, for the simple reason that stability and security are in themselves a powerful constituent element of justice; and the same experience teaches us that when the element of change is destined to be victorious, this process, far from being invariably effected by the action of the legislature, frequently takes place through the less ostentatious activity of courts either remaining formally within the orbit of the existing law or disregarding it by applying general principles of law, equity, and public policy.

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[1] Foenander, "The New Conciliation and Arbitration Act in Australia", in *International Labour Review*, XIX (2), 1929, p. 164.

These general observations may well be illustrated by a consideration of the possibilities of Article 19 of the Covenant, in which the postulate of international legislation modifying obsolete rights and legal conditions is expressed in a hesitating but unmistakable manner. There are very few who deny the imperative necessity of giving concrete shape and effectiveness to that article. However, its present imperfection must not be allowed to cause us to exaggerate the possibilities of its application. What would be the scope of the operation of an international legislature as foreshadowed in Article 19 in removing what are now regarded as the main obstacles to peace and the main causes of international friction? Would it be able to effect any territorial changes of importance without provoking the most determined and embittered opposition of those threatened by the proposed change, an opposition which would shatter the very foundations of the international organization embodied in the League of Nations?

Would an international legislature be in a position, without exposing the League to the danger of immediate and inglorious dissolution, to limit the freedom of states in the matter of tariffs and migration? It is not only the opposition of sovereign states, but the inherent difficulties of the problems involved which would act here as a powerful check upon legislative activity. Thus, to mention one instance, who would make bold to maintain with assurance, justifying international enactments of a radical nature, that the opening by virtue of such an enactment of the thinly populated territories of some states to foreign immigration would be just, desirable, and expedient? Perhaps the historian, when viewing in the distant future the growth of the League of Nations in the first century of its existence, will comment on the rudimentary character of its legislative organs at that stage as having been a blessing in disguise, namely, as having prevented its disruption as the possible result of attempts to settle matters of this nature with the help of the dangerous instrument of a majority vote, and as having made possible their discussion in an atmosphere of persuasion and relative detachment.

The view here put forward as to the limitations of international legislation, as modifying or supplementing existing law and thus removing the causes of international friction, must not be considered as implying that the residuum of cases, namely, those in which an international legislature can with advantage function as an *ultimum refugium pacis*, is without importance. Undoubtedly the absence of international legislation puts a heavy strain upon judicial settlement as an obligatory institution, but to cut the Gordian knot by rejecting, on this account, obligatory arbitration altogether is too simple a solution. To do so is to exhibit an attitude of resignation. The unprogressive character of this negative attitude is only thinly veiled by willingness to recede from it as soon as an effective international legislature becomes a reality. For this is a consummation which for a long time to come must continue to be an ideal and no more. The setting up of an international legislature would constitute the most fundamental change in the present organization of international society and a derogation from the traditional attributes of national sovereignty immeasurably greater than even a most comprehensive acceptance of the obligations of compulsory judicial settlement. To regard the establishment of an international legislature as a condition precedent to the setting up of a system of obligatory arbitration is in effect to reject an institution of vital importance to the existence of any legal community on the ground that that community has not as yet developed certain modes of creating law. This we believe to be a counsel of despair.

It is submitted that there are open to the international lawyer more constructive avenues of approach. Firstly, bearing in mind that even within the state, where the authority of the national legislature is supreme, law is to a considerable extent shaped and developed by courts, he ought to examine what are the actual extent and the possibilities of judicial law-making within the international society. Secondly, it is within his province to inquire into the possibilities of a deliberate extension, by the will of the parties, of the process of judicial legislation by international tribunals. Thirdly, it is his duty to consider in a constructive spirit the possibilities of political action falling short of a legislative procedure but intended to prevent or to modify the operation of legal rules deemed to be contrary both to justice and to the peace of the world.

III

Judicial Legislation in International Law.

(*a*) *Judicial Law-making.* Judicial law-making is a general legal phenomenon in societies where justice is administered by judicial tribunals. Accordingly, like courts within the state, so also international tribunals, by the very nature of the judicial function, are not confined to a purely mechanical application of the law. When applying the necessarily abstract rule of law to concrete cases, they create the actual legal rule for the individual case before them. The actual operation of the law in society is a process of gradual crystallization of the abstract legal rule beginning with the constitution of the state, as the most fundamental and abstract body of rules, and ending with the concrete shaping of the individual legal relation by a judgment of a court or by an adjudication or decision of an administrative authority or by an agreement of the interested parties. The separation of powers as between the judiciary and the legislature is of as legendary a nature as is that between these two organs and the administrative power. There are obvious limits to this law-making activity of judges, but these limitations do not materially alter the fact that courts do not slavishly administer abstract rules without being able to exercise creative discretion. It is irrelevant whether this exercise of discretion is done by recourse to conceptions of justice, or general principles of law, or the law of nature, or public policy. These considerations will not, as a rule, over-ride express provisions of the written law, but there are few Acts of Parliament which cannot be interpreted or judicial precedents which cannot be "distinguished" so as to avoid results repugnant to these general principles of law and justice. These considerations apply with special force to the functioning of international tribunals. In international law, where conscious law-making by legislation is in a rudimentary stage, where the creation of customary law is slow and difficult of ascertainment, where judicial precedent is relatively rare and of controversial authority, and where, in consequence, the field of detailed concrete regulation is small and that of general principles of law wide and elastic, the scope of judicial discretion and judicial law-making is considerable. These factors enable international tribunals, in a large number of cases, to deal with claims on a basis wider than that of formal or rigid law. And the very generality of some of the principles of international law enables them, while recognizing the binding force of these principles,[1] to refuse to give legal recognition to claims which are manifestly obsolete and unjust. Reasons of space permit of the mention of only two instances of this aspect of the work of international tribunals. One refers to the unfair and anti-social use of rights; the other, to the judicial application of the doctrine *rebus sic stantibus*.

By the application of the general principle, *sic utere jure tuo ut alterum non laedas*, international courts while acting strictly in accordance with their judicial function are in a position to counteract that fruitful source of international friction which is occasioned by rigid and inequitable exercise of sovereign rights. International tribunals have been confronted with this problem, and have not hesitated to give expression to the legal condemnation of abuse of rights.[2] In particular, strictly judicial tribunals of a quasi-international character, namely, tribunals exercising compulsory jurisdiction in disputes between state members of federal states, have built up in these matters a body of judicial precedent which fully reveals the possibilities of this aspect of judicial settlement. The indiscriminate use, in the exercise of their sovereign rights, of the flow of rivers by riparian states to the detriment of their neighbours has been consistently checked and discouraged by these tribunals. The judgments of the Supreme Court of the United States,[1] of the Swiss Federal Court[2] and of the German Staatsgerichtshof[3] are all unanimous in asserting this principle as against the insistence on the formal rights of sovereignty. Various philosophies of law and the practice of courts of various countries may give a different formulation to this principle. The "free law" tendencies in the administration of justice in Germany; the theory of *abus de droit* in France; or to a lesser extent the application by English courts, without resorting to a clear cut theory,[4] of the same principle to wrongful use of property to the injury of a neighbour, to use of flowing water and, generally, to any act of annoyance sufficiently great to constitute a nuisance according to common law—all give expression to the same fundamental principle of law, although on the continent of Europe the rule has been resorted to more frequently than elsewhere, with a view to reconciling the opposition and effecting the higher synthesis of the conflicting claims of change and stability in society. However, the result is everywhere the same, namely, that the courts resort to a comprehensive legal principle of social justice and solidarity calculated to render inoperative unscrupulous appeals to formal rights endangering the peace of the community. But it is only the existence of tribunals endowed with compulsory jurisdiction which frustrates attempts at petty appeals to formal rights. Failing such compulsory jurisdiction, selfish claims of state

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[1] The *Lotus* case, in which both parties based opposite contentions on the same general notion of international law, i. e. on the principle of sovereignty, and in which the Court, formally adopting that principle, arrived at a legal rule not propounded by either of the parties, namely, that the jurisdiction of the municipal courts in cases like that before the Court should be concurrent, offers a good illustration. See *Publications of the Court*, Series A, No. 10, p. 30.

[2] See, for instance, the award of the King of Prussia of November 30, 1843, in the arbitration between Great Britain and France concerning the measures adopted by France on the coast of Portendic: Moore, *History and Digest of International Arbitrations*, &c., Vol. V, p. 4936; and Lapradelle-Politis, *Recueil des arbitrages internationaux*, Vol. I (1906), pp. 512 *et seq.* And see for other examples, and generally on the whole question, Politis, "Le problème des limitations de la souveraineté et la théorie de l'abus

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des droits dans les rapports internationaux", in *Académie de Droit International, Recueil des Cours*, 1925, Vol. I, pp. 5–121; Le Fur in *Annuaire de l'Institut de Droit International*, Vol. XXXIII (2), 1927, pp. 786–8; and *ibid.*, pp. 750–5.

[1] See, among many others, *State of Kansas* v. *State of Colorado*, 185 U.S. 125; *State of Missouri* v. *State of Illinois and the Sanitary District of Chicago*, 180 U.S. 208; and the recent case, decided in 1929, of *Wisconsin et al.* v. *Illinois and Sanitary District of Chicago*, 278 U.S. 367.

[2] See, for instance, the decision in the case between Aargau and Zürich, of January 12, 1878, *Recueil Officiel des Arrêts*, Vol. IV, pp. 46 ff.

[3] See, for instance, the decision in 1927 in a dispute between Prussia, Baden, and Württemberg, in *Entscheidungen des Reichsgerichts in Zivilsachen*, Vol. CXVI, Appendix.

[4] But see the very clear pronouncement of Lord Truro in *Egerton* v. *Brownlow*, 4 H.L. Cas. 1 at p. 195.

sovereignty have a tendency to assert themselves in a short-sighted and petulant manner.[1]

As another example of the possibility of international courts having recourse to a general principle of law with a view to rendering inoperative obsolete legal rights there must be mentioned the doctrine *rebus sic stantibus*. Whatever may be the legal basis of the doctrine that in certain circumstances a change of conditions will render a contract inoperative, that doctrine embodies a juridical principle whose soundness and conformity with justice are universally admitted. In international law, however, the fact that the ascertainment of the change of circumstances and of the voidance of the contract have been, in the absence of a compulsory jurisdiction of international tribunals, left to the appreciation of the interested party, has not only prevented the doctrine from acquiring the authority of a generally recognized rule of positive law, but has gained for it a notoriety illustrating one of the weakest links in international law. The compulsory jurisdiction in such cases of an international court would restore the essential condition of the proper functioning of an otherwise beneficial principle. At the same time the application of the doctrine by a court endowed with such jurisdiction would emphasize its function of judicial legislation consisting in formally declaring unenforceable such legal relations as have become obsolete and unworkable.

(*b*) *Extension and Modification of Judicial Legislation by the Will of the Parties.* The wide scope of judicial discretion by means of application of general principles of law and, generally, by means of judicial law-making does not altogether remove the possibility of judges being compelled by their judicial duty to render judgments which, although legally unimpeachable, might be morally and politically objectionable and far from fulfilling the ultimate object of the law, namely the securing of peace through justice. Much of the harshness involved in the operation of the law and in giving effect to it is unavoidable and inherent in the function of the law as an agency of stability and security. This, however, does not mean that there is in such cases no remedy against the drawback of compulsory arbitration resulting from the absence of an international legislature, and that a truly statesmanlike and far-seeing policy of governments based on their moral obligations towards the international community, whose peace cannot always be safeguarded by adherence to formal justice, has no means of adopting measures calculated to obviate these disadvantages. Such measures are compatible with the institution of obligatory arbitration, although their adoption must necessarily remain within the discretion of the parties considering the merits of each particular case. This can be done in a variety of ways:

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[1] See, for instance, in regard to the Rio Grande and the complaint of Mexico, *U.S. Opinions of Attorney-General*, Vol. XXI, p. 274.

(i) The parties may, after the dispute has arisen, agree that in case the judgment should have the effect of stabilizing conditions which have become unworkable or creating a deadlock leaving unprotected common interests capable or in need of regulation, it shall be within the province of the court either to lay down rules or to propose recommendations calculated to establish a new legal position. In the latter case, provision could be made for embodying the recommendations in a subsequent final judgment should the parties fail to agree to accept them in direct negotiations. There are instances of the parties entrusting the tribunal with this particular form of judicial legislation. Thus Article VII of the Arbitration Treaty of February 29, 1892, concluded between Great Britain and the United States for the settlement of the Behring Sea controversy, laid down that if the answer of the tribunal to the questions put to it in regard to the jurisdiction of Great Britain "shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seals in, or habitually resorting to, the Behring Sea, the arbitrators shall then determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary and over what waters such Regulations should extend."[1] Similarly, in Article IV of the arbitration agreement of April 4, 1908, between Great Britain and the United States for the settlement of the dispute concerning the North Atlantic Fisheries, it was laid down that the tribunal should recommend for the consideration of the parties rules and methods of procedure under which all questions which might arise in future regarding the exercise of the disputed rights of fishing might be determined in accordance with the principles laid down in the award. The recommendations of the tribunal, made in pursuance of that article, were accepted by the parties and embodied in a formal treaty.[2]

(ii) The parties may agree that the legal pronouncement of the court shall be of a provisional nature, in the sense that it shall form the basis of subsequent negotiations between the parties, with a view to arriving at an equitable application of the judgment, and that in case they shall be unable to arrive at such an agreement, the task of reconciling the strictly judicial pronouncement of the court with considerations of equity shall be left to an arbitral tribunal. There is a recent instance of the parties envisaging the entrusting to a tribunal of the decision of a controversy on the basis of considerations not wholly identical with existing law as found by the court. We refer to the Special Agreement signed on April 19, 1928, between France and Yugoslavia submitting for decision by the Permanent Court of International Justice certain questions concerning the payment of various Serbian loans floated in France.[1] Article II of that Agreement provided that within one month from the delivery of the decision by the Court, the two Governments and the representatives of the bondholders should meet with a view to concluding an arrangement which: (*a*) in the event of the Court deciding in accordance with the submission of Yugoslavia, should determine whether considerations of equity do not require the Government of that country to make concessions over and above those which it would be obliged to make in strict law; (*b*) in the event of the Court finding in favour of the bondholders, would grant certain concessions to the Government of Yugoslavia, having regard to its financial and economic position. These provisions had the effect of merely suspending the operation of the judgment, for the same article provided for a final decision of the matter by arbitrators, to be appointed by the parties, or, in case of their disagreement as to the appointment of arbitrators, by the Permanent Court itself.

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[1] Moore, *op. cit.*, Vol. I, p. 801.

[2] Hertslet's *Treaties*, Vol. XXVII, p. 1095.

(iii) The parties may lay down that it shall be open to the tribunal, while rejecting the claim of the plaintiff, to state, without adding a binding recommendation, that compliance, totally or in part, as an act of grace, with the demand of the plaintiff would be in accordance with justice and equity. Some of the awards given by the British-American Pecuniary Claims Tribunal under the Convention of August 18, 1910, offer instructive examples of such recommendations. Thus, in the case of the *Home Missionary Society*, the Tribunal, while dismissing the claim on the ground that it had no foundation in law, expressed the opinion that, in view of the services rendered by the Society in its task of peaceful development and civilization of the native inhabitants, if the British Government would avail itself of any fund from which to repair the losses sustained by the Society "it would be an act of grace which this Tribunal cannot refrain from recommending warmly to the generosity of that Government".[1] When in the *William Hardman* case the Tribunal rejected the claim for compensation for destruction of private property in pursuance of necessary measures of warfare, it recommended the individual affected by these measures to the favourable consideration of the United States Government "as a basis for any friendly measure which the special conditions of the sufferer may justify". The Tribunal pointed out that although there is no legal obligation to compensate "there may be a moral duty which cannot be covered by law, because it is grounded only on an inmost sense of human assistance, and because its fulfilment depends on the economical and political condition of the nation, each nation being its own judge in this respect".[2] Similar recommendations were made in the *Cadenhead* case[3] and in the case of the *David J. Adams*.[4] There is nothing in existing international arbitral law to prevent the tribunal, even without a special authorization on the part of the disputants, expressing an opinion in this direction. But an explicit power of this nature granted to the tribunal in the special *compromis* concluded under a general arbitration treaty would both emphasize the intention of the parties not to insist on the strict provision of the law and indicate an informal undertaking to comply with the recommendation.

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[1] The Agreement is printed in *Publications of the Court*, Series C, No. 16 (III), p. 292.

(iv) The special agreement may provide that the court shall give a decision *ex aequo et bono*. Such an agreement would undoubtedly constitute an act of good will and accommodation on the part of the state favoured by the law in force, but there is no reason to assume that the likelihood of a government adopting a statesmanlike attitude of this kind is so remote as to render the suggestion purely academic. A considerable number of recent arbitration conventions show that states may be prepared to entrust a tribunal with the power to decide *ex aequo et bono*, which is in effect tantamount to endowing it with a legislative function, not only in regard to a particular dispute within the purview of a general arbitration treaty[5] but also in regard to future disputes.

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[1] *American and British Claims Arbitration*, Report of F. K. Nielsen (1926), p. 426.

[2] *Ibid.*, p. 497.

[3] *Ibid.*, p. 508.

[4] *Ibid.*, p. 536.

[5] In some of these treaties all disputes are subject in the first instance to conciliation, followed, if the recommendations of the conciliation commission are not accepted, by a final judgment of the Permanent Court of International Justice. If in the opinion of the Court the dispute is not of a juridical nature, the parties bind themselves to agree to its being settled *ex aequo et bono*. Here belong the treaties between Italy and Switzerland of September 20, 1924 (*League of Nations, Arbitration and Security, Systematic Survey of Arbitration Conventions*, 1927, p. 206), between Spain and Switzerland, of April 20, 1926 (*ibid.*, p. 314), between Roumania and Switzerland, of February 3, 1926

Whatever one may think of the desirability of this latter method, it shows to what length states may be prepared to go. Neither is the conferment, in a special agreement, of jurisdiction *ex aequo et bono* open to valid objection on the ground that a power of this nature would derogate from the strictly judicial character of an international tribunal.[1] This power is reserved to the Permanent Court of International Justice in Article 38 of its Statute. Moreover, the will of the parties to have their dispute decided *ex aequo et bono* constitutes in itself a source of positive law of a general content to be applied by the Court like any other international convention "whether general or particular, establishing rules expressly recognized by the contesting states" (Article 38). The apprehension that that Court might on this account lose its strictly judicial character is legally as unfounded as the idea of the Court as an august automatic slot-machine, totally divorced from the social and political realities of the international community, mechanically issuing its legal pronouncements in accordance with rigid and well-defined principles.

The conferment in the special agreement of jurisdiction *ex aequo et bono* amounts to an acceptance of the procedure of conciliation modified by the obligation to accept the finding of the Court as a final settlement. There are weighty and, we believe, decisive objections to such powers being conferred in advance within the frame of obligatory arbitration. The mere possibility

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(*ibid.*, p. 249), between Italy and Spain, of August 7, 1926 (*ibid.*, p. 314), between Italy and Chile, of February 24, 1927 (*League of Nations Treaty Series*, Vol. LXIX, p. 277), between Spain and Portugal, of January 18, 1928 (*ibid.*, Vol. LXXVII, p. 115), and between Switzerland and Greece, of September 21, 1925 (*ibid.*, Vol. LXXXVII, p. 195). Other treaties establish a distinction between disputes "as to respective rights" and other disputes. The former must be submitted to the Permanent Court of International Justice, either before conciliation, which is optional, or after the failure of the conciliation proceedings. The latter must in the first instance be submitted to conciliation, failing which the dispute shall be submitted to an arbitral tribunal, constituted in accordance with The Hague Convention of 1907 for the Pacific Settlement of International disputes, which shall decide *ex aequo et bono*. To this group belong the treaty between Austria and Sweden, of May 28, 1926 (*Arbitration and Security*, p. 260), and the treaties of Belgium with Sweden, of April 30, 1926 (*ibid.*, p. 297), with Denmark, of March 3, 1927 (*ibid.*, p. 305), with Switzerland, of February 5, 1927 (*ibid.*, p. 320), with Finland, of March 4, 1927 (*ibid.*, p. 333), with Spain, of July 19, 1927 (*League of Nations Treaty Series*, Vol. LXXX, p. 28), with Portugal, of July 9, 1927 (*ibid.*, p. 337); the treaty of Sweden with Spain, of April 26, 1928 (*ibid.*, Vol. LXXVII, p. 79); of Finland with Spain, of May 31, 1928 (*ibid.*, Vol. LXXXII, p. 231). Finally, here belongs the so-called General Act recommended by the Ninth Assembly of the League of Nations, in which the right of the arbitral tribunal to decide *ex aequo et bono* plays a prominent part.

[1] For an illuminating discussion of this aspect of the matter see Hostie, *op. cit.*, pp. 584–6.

of such a power being exercised would reduce the authority and usefulness of the existing rules of international law, and would in fact confer upon the international court unchecked and unlimited powers of legislation. No such objection attaches to the granting of such an authority in a particular case, as an act of friendliness on the part of the state which may hope to benefit from the application of strict law and which is entitled to a judicial verdict by virtue of the general arbitration treaty. If there is a possibility and a necessity of developing by international organs a kind of equity jurisdiction modifying the existing law, then there is every reason why this should be done by a permanent body, of high authority, learning, and impartiality, which can be relied upon to shape international equity, not in a haphazard way, but in accordance with principles capable of general application.

(v) The parties may, without conferring upon the Court functions of a legislative character, agree to avail themselves of the judicial pronouncement, whose eventual finality remains unimpaired, as the basis of subsequent negotiations calculated to establish a new legal situation between them. An agreement of this type means that the parties reserve to themselves the legislative function instead of entrusting it to the Court, whose judgment becomes fully operative if the negotiations prove abortive. The special agreement of October 30, 1924, between France and Switzerland concerning the interpretation of the provision of Article 435, paragraph 2, of the Treaty of Versailles, relating to the free zones of Upper Savoy and the district of Gex, offers an example of this procedure. In that convention the parties agreed to submit their dispute to the Court with the request that the latter should consider the question in regular proceedings, but that before giving formal judgment it should "unofficially" communicate to the parties its views as to the legal aspect of the matter, fixing at the same time a reasonable period within which the parties, apparently on the basis of the legal opinion of the Court, should settle between themselves the régime to be applied to the districts mentioned.[1] The same agreement provided that should the parties fail to conclude and to ratify within that period a treaty embodying the settlement, the Court should by means of a final judgment pronounce both on the merits of the dispute and on the manner of its execution. This agreement, which in effect amounted to a request for an advisory opinion prior to the rendering of the formal judgment, asked the Court to exercise a function not envisaged by the Statute of the Court. Very wisely, if we may say so with respect, the Court considered that it could assume jurisdiction in view both of its duty to facilitate a direct and friendly settlement between the parties and of the fact that its legal opinion could conveniently be expressed in the form of the reasons underlying an order, not having either binding force or final effect,[1] fixing the time limit within which the parties were instructed to arrive at an agreement. It is true that the Court, while complying with the request of the parties, expressed the view that it is important that "special agreements whereby international disputes are submitted to the Court should henceforth be formulated with due regard to the forms in which the Court is to express its opinion according to the precise terms of the constitutional provisions governing its activity", but this view is in no way expressive of the value and possible usefulness of the course adopted in the special agreement. It only states that the form of the special agreement was not in conformity with the requirements of the Statute. But one may still inquire into the desirability or appropriateness of amending the Statute so as to bring formally within its purview arbitration agreements like that concluded by France and Switzerland. It is not unreasonable to expect that the constitution of international institutions should conform to the needs of international society, and the question ought in the future to be considered on its merits, namely, whether without renouncing the benefits of a binding judicial pronouncement, it may not be useful to offer to the disputants an opportunity of arriving at a settlement of which the legal opinion of the Court should form one, but not the only, element.

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[1] See *Publications of the Court,* Series A, No. 22, p. 7.

The agreement between France and Switzerland raises the question whether within the frame of the obligatory jurisdiction of the Court, provision should not be made for enabling the parties to have recourse to the advisory jurisdiction of the Court. The advisory opinion neither has, nor is intended to have, the binding effect contemplated by the judgment. While possessing the full authority of ascertaining beyond doubt the legal position, it leaves room for its adaptation, in direct negotiations in which the air has been cleared and part of the controversy removed by a legal opinion, to other than purely legal consideration. At present states are in a position to approach the Court with a request for an advisory opinion through the Council or the Assembly of the League. Thus when in 1927 a dispute arose between Greece and

[1] See Articles 59 and 60 of the Statute.

Turkey concerning the interpretation of a clause in the Agreement of December 1, 1926, concerning the jurisdiction of the Mixed Commission for the Exchange of Greek and Turkish Populations, the parties asked the Council of the League to request the Court to give an advisory opinion on the disputed question. The Council complied with the request and the Court gave its opinion on August 28, 1928.[1] It might be useful to consider how far it would be in the interests of peace and of international justice if the parties could directly ask the Court for an advisory opinion with a view to obtaining the benefits of a judicial decision coupled with the provisional suspension of its effect. In certain respects an advisory opinion of this kind would not differ from a declaratory judgment.

(vi) Finally, the disputants may, before submitting the matter to the Court, themselves assume part of the legislative function by modifying or defining more clearly the existing law. Thus when there is a danger that the application of certain legal rules or principles may yield results which are either unjust or so radically disturbing of the established *status quo* as to be impracticable, the disputants may lay down in the arbitration agreement concrete rules calculated to guide the tribunal and to prevent any such result. Thus in the arbitration convention concluded in 1897 between Great Britain and Venezuela concerning British Guiana, the two countries agreed to adopt for the guidance of the tribunal a rule defining both the period and the requirements of prescription as a title to acquisition of territory. This course was adopted after it had become clear that, although Great Britain might eventually be induced to abandon her unwillingness to arbitrate, she would do so only if provision were made for making impossible a judgment rendered in accordance with formal and undefined rules as to acquisition of title by discovery. On the other hand, the Treaty of May 8, 1871, between the United States and Great Britain, which provided for the arbitration of the Alabama claims and laid down the well-known "three rules of Washington", offers an example of the parties defining a disputed point of law and leaving to the tribunal the substantial task of deciding how far the claims put forward come within the rules thus defined.

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[1] *Publications of the Court,* Series B, No. 16.

IV

Political Substitutes for Legislation.

The present article would entirely fail in its object if it were understood as denying the seriousness of the problem created for obligatory arbitration by the absence of an international legislature. It is, however, emphatic in insisting that the difficulty arising from this drawback of international organization cannot be solved by rejecting obligatory arbitration altogether, that is by aggravating one evil through perpetuating another of even graver and more anarchical consequences, but by exploring the means either actually operating or calculated to operate in the direction of removing the dangers resulting from the absence of an agency amending the existing law. Thus it has been pointed out that much of this amending process is actually and necessarily performed by international judges in the ordinary exercise of their judicial function. Secondly, instances drawn from the practice of states have been adduced and discussed in which the parties agreed by voluntary agreement so to extend or to modify judicial legislation as to make it conform with requirements of justice and progress. It is in these voluntary agreements, dictated by a far-seeing spirit of accommodation and by a realization of the ultimate solidarity of interests, and concluded as occasion arises within the all-embracing obligation to submit to final judicial settlement, that the major part of the remedy lies. It is a positive duty of international lawyers to explore these avenues in detail and to examine their possibilities—a task which could not well be attempted within the scope of this article.

However, the problem of preventing judgments of courts from becoming a source of friction and an instrument of injustice is of too great importance, even if reduced to its proper proportions, to be left entirely to the initiative of states. Alongside, therefore, of the consideration of the means, the recourse to which must necessarily be left to the initiative and the free will of the disputants, there ought to be considered methods the use of which must not be dependent upon the decision of the state which stands to benefit from the strict application and enforcement of the existing law. There are several methods of varying degrees of practicability which could be considered in this connexion. Only a very general outline of them can be attempted here. Thus, methods must be examined calculated either to facilitate the making effective of Article 19 of the Covenant, so long as that article remains in its present unsatisfactory position, or, independently of Article 19, to secure the assistance of the political organs of the community of nations in over-riding the consequences of a dangerous and materially unjust judgment. It is believed that the judicial organs of the international community could, without derogating from their judicial function and their position of impartiality, play a useful—and, it is believed, at present an essential—part in this process. Thus, it might be considered how far, possibly by an appropriate change in the Statute, the Court should be empowered to state that the judgment, whilst given in accordance with the existing legal position, might with advantage be considered, with a view to a possible modification of its terms in the wider interest of international peace, either by the parties themselves or by the Council of the League. Such an opinion on the part of the Court, if expressed either with unanimity or with a substantial majority approaching unanimity, could be given the effect of suspending the execution of the judgment pending the consideration of the matter by the Council. Although not accompanied by an express recommendation as to the solution of the difficulty, it would undoubtedly carry weight in any subsequent deliberations of the Council. As the law stands now, there is nothing to prevent the Council from considering under Article 11 a judgment of an international tribunal, either *proprio motu* or at the initiative of any Member of the League, as was done in the recent Hungarian-Roumanian dispute. But the method here suggested, being grounded in the will of the Court and the provisions of the Statute of the Court, could be resorted to without producing the otherwise unavoidable result of impairing the authority of the judgment, of the Court, or of international justice generally. A further development of this process would consist in suspending indefinitely, by the vote of an appropriate majority of the members of the Council, the execution of a judgment based on legal rules or rights which, to paraphrase Article 19 of the Covenant, have become inapplicable or whose continuance might endanger the peace of the world.

In fact, the time has come to consider whether the present deadlock of Article 19 cannot, in a restricted sphere, be successfully overcome by making a judicial pronouncement, having no binding effect, the starting-point for putting into operation the political machinery for revising the existing law or at least for rendering inoperative obsolete law. The writer is fully aware that weighty objections can be advanced against any such scheme as is here tentatively put forward for consideration and discussion. However, it is not difficult to pile up objections. The question is whether a purely negative attitude ought to be allowed to hold the field in face of some vital needs of international peace and justice calling for constructive efforts. In particular, undue importance need not be attached to the apprehension, to which international lawyers appear to be singularly susceptible, that the exercise of a function of this nature may place in jeopardy the judicial character of the Court. Undoubtedly, the use by the Court of powers of the nature here suggested might result in its becoming involved in the political controversies of the day. But the danger ought not to be exaggerated. The great majority of cases brought before the Permanent Court of International Justice have been of a highly political character, and whatever may be the nature of the Court's pronouncement, it cannot be altogether detached from the background of political controversy. It is a mistake to assume that it is incompatible with the duty of the judge to criticize the law in accordance with which judgment is given and to make suggestions for its improvement. The judicial character of judgments of municipal courts is not impaired by the fact that the judges, while feeling bound to administer the existing law, frequently express strong views as to the reasonableness or justice of the legal provisions in question. But the task of explicitly amending the existing law is not within their province, either within the state or in the international society. In the latter, that task must rest with the political organs of the organized international community, in particular with the Council of the League of Nations. This, and not the settlement of any dispute which the parties may care to submit to its decision, is the proper province of the Council in the sphere of the pacific settlement of international disputes. Such a conception of its function would have the additional advantage of leaving it more free than hitherto to devote itself, unencumbered by the rôle of a judge in petty but prolonged disputes, to the major task of international government in general and of initiating international legislation in particular.

THE PROPOSED AMENDMENTS TO THE COVENANT OF THE LEAGUE OF NATIONS

By PROFESSOR C. A. W. MANNING, B.C.L., M.A., Cassel Professor of International Relations in the University of London.

On August 27, 1928, as is well known, an instrument commonly styled the Kellogg Pact was signed by the representatives of fourteen Members of the League of Nations, to receive within the ensuing year the adhesions of an overwhelming majority of their fellow-Members. In September 1929, following upon a proposal made by the British Prime Minister, the Assembly declared "that it is desirable that the terms of the Covenant of the League should not accord any longer to Members of the League a right to have recourse to war in cases in which that right has been renounced by the provisions of the Pact of Paris", and invited the Council to appoint a Committee to frame a report "as to the amendments in the Covenant of the League which are necessary to bring it into harmony with the Pact of Paris". The report here contemplated, having lately appeared, forms the subject of the present article. Its careful examination by serious students of the League is desirable just now as it is being submitted to the Members of the League "in order that such action as may be deemed appropriate may be taken during the meeting of the eleventh ordinary session of the Assembly in 1930".

The presupposition officially formulated by the Assembly as the basis for its action will hardly need to be disproved. The mutual relationships of League Members are governed, not by the Covenant merely, or by the Peace Pact merely, but by the *ensemble* of international law, including the provisions of those two instruments. The Covenant neither accords nor purports to accord to its signatories a "right" to do anything which would otherwise be unlawful. As the Rapporteur, M. Cot (France), reminded the Assembly: "It was, of course, obvious that no legal necessity existed to amend the Covenant in consequence of the signature of the Pact for the general renunciation of war. The Briand-Kellogg Pact, indeed, does not conflict with the Covenant. It extends and supplements it, and the legal position of the states Members of the League which have also signed the Briand-Kellogg Pact is clearly defined by these two international treaties taken in conjunction".

But what is not legally necessary may yet be deemed politically expedient, and, as the Amendments Committee recognized from the first, it "was not called upon to inquire whether it was expedient to amend the Covenant of the League of Nations. This question has already been answered by the Assembly".

To British readers it should be of some interest to notice in what ways the newly published proposals represent an advance upon the "formal modifications" put forward in the First Committee by Sir Cecil Hurst—as seeming to his Government to be "required in the terms of the Covenant in view of the fact that a major obligation had now been accepted by most states when they became parties to the Pact of Paris".[1] Those modifications appeared to proceed from a desire simply to include in the Covenant the substance of the Peace Pact, coupled with an admitted readiness that, for the sake of uniformity, the sanctions at present applicable against war begun in certain circumstances of peculiar aggravation should in future cover every case of unlawful recourse to war.[2] The only substantive difference those modifications would have made in the mutual relations of almost all League Members would have been this new obligation to apply sanctions to wars which before the Peace Pact would not have been unlawful. And, so far from this extension of commitments being advocated as the gist of the plan, it was spoken of as "more theoretical than real". The only ostensible purpose in fact was that the Covenant should be caused to register the recent loss by Member states of their residuary liberty to use war (and hence, in effect, the threat of war) as an instrument of national policy. It is true that Mr. Ramsay MacDonald had originally spoken of his Government's desire to "build up what I call the foundations of the Pact of Peace", but, passing in his next sentence to what has become the more fashionable metaphor, he went on to talk of "pruning out the dead wood from the Covenant". So too, as though to emphasize the relative unimportance of the 'sanctions' aspect of the proposals, the speech in which they were elaborated by the Foreign Secretary contained no allusion to Article 16.

Other important delegations, however, viewed the matter differently. M. Briand, after a regretful allusion to the 1924 Protocol, asked rhetorically: "Does that mean that we are henceforth to renounce our endeavour and begin again in some other form, that we are to put systematically on one side all idea of penalties?" And the Roumanian delegation thought "that, in the case of any state Member of the League which is also a signatory of the Paris Pact, Article 16 should apply as soon as that state is guilty of any violation of that Pact". Other aspects also appeared. The late Dr. Stresemann said: "If we are to have complete concordance between the provisions of the Covenant and the principles underlying the Kellogg Pact, we can hardly, I think, confine ourselves to examining the articles expressly mentioned in the British proposal; we must also examine any other provisions of the Covenant which are inseparably bound up with those of the Kellogg Pact." And M. Motta said: "That Pact connotes compulsory arbitration. It does not explicitly prescribe it, but it postulates it." And M. Rolin: "Other suggestions might be made; for instance, the Council's recommendation might be regarded as equivalent to an arbitral award, for the enforcement of which the Council would take all proper steps." Finally the Rapporteur, addressing the plenary Assembly: "Some Members had in mind simply a literal adaptation, as it were, a correlation of the texts. Others thought that since resort to war was to be eliminated from the Covenant, something else should be substituted for it."

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[1] The text of the British proposed amendments is printed at the end of this article.

[2] Article 16 requires the application of sanctions against any Member of the League that resorts to war in disregard of its Covenants "under Articles 12, 13 or 15". To extend, as is proposed, the scope of the prohibition contained in Article 12 is, therefore, *ipso facto* to extend also the scope of the repressive measures provided for in Article 16.

The report of the Amendments Committee sheds some light on the preoccupations that underlay the proposals submitted. The keynote, at a first reading, seems to be one of caution. At intervals there recurs a formal confession of conservative bias. "Strictly speaking, it is not part of the Committee's duty to examine an amendment, however desirable in itself, which is not imposed by a desire to harmonize the two Pacts." "The Committee decided to touch the provisions of the League Covenant as little as possible. It is not required to make a general revision of the Covenant but simply to ensure harmony between the two instruments", and so on.

But the Committee had its definite and clearly conceived task to perform; and it was not on the narrower, or original British, conception of that task that it proceeded. "The Covenant of the League has an organic character which must be maintained", and what that character seemed to the Committee to involve may be seen in the amendments they propose.[1] Apart from the extended provisions for the prohibition and repression of war, the broad effect of these changes would be to confer upon the League Council a novel competence, given the necessary measure of agreement, to impose upon disputant Members solutions, or methods of solution (e.g. submission to the arbitral ruling of some specified individual), which they would have no legal choice but to accept,[1] and, secondly, to strengthen materially such provision as is made in the existing Covenant for concerted pressure to be put upon any disputant Member that hesitates to comply with the result of pacific proceedings unfavourable to itself.[2] And, whether or not these changes are strictly necessitated by the Peace Pact, they at least are said to contain nothing that may be considered as running counter thereto.[3]

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[1] The text of the Committee's proposals is printed at the end of this article.

In regard to the extension of sanctions against war, the Committee, adopting the argument of the British delegate at the Assembly (an argument which the Danish delegation had declared itself unable to share, and the Netherlands delegate had stated that he did not understand), observes that "the stronger the system of sanctions the less risk of having to apply them", so that "in practice the amendments of Articles 12, 13 and 15, will not add to the burden of the obligations contracted by states under Article 16".

Whether all these proposals are truly necessary to the harmonizing of the Covenant with the more recent Pact is not perhaps a pressing question, for, short of introducing any element of actual conflict between the two, the League Members are plainly at liberty, with whatever slogan, to amend their Covenant as they will. The question, however, of actual conflict is of course entirely germane. That sanctions against the lawless war-maker may be applied even by signatories of the Peace Pact would seem clear enough, if only from the wording of the preamble.[1] But it is not only to violators of the Peace Pact that force is to be applicable. It is plain that in the last resort—and after all, it is by what is capable of happening in the last resort that the specific character of any scheme of relationships is chiefly determined—"international police measures" resolved upon at the Council table are to be launched against a state resisting, not actively but merely passively, the formula of solution which has resulted from an obligatory procedure of settlement. Operations to which "the rules of the law of war" would appear to be applicable—though "it might be doubtful whether the case was one of war properly so-called"—are to become legitimate (as contrasted with war "as an instrument of national policy") when proposed by a unanimous Council. It is to be hoped that important non-Member states would officially perceive the distinction.

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[1] "Resort to war being henceforward prohibited, its place must be taken by methods of pacific settlement in order to ensure the settlement of disputes." "The general principle by which the Committee has been guided has been that the elimination of resort to war should have as its consequence the extension of the procedure of pacific settlement. Otherwise war would only be prohibited by the law and in practice there would be a danger that, in default of any other solution, states would be led to adopt a warlike attitude."

[2] "Provision must be made for the possibility of such proceedings (pacific procedures other than recourse to the Council) failing or not being resorted to at all." "The Council's obvious duty is to take all the necessary measures to cause effect to be given to the award or judicial decision." "The Committee felt that a report which was unanimously adopted was of so great authority that it ought to prevail over the individual will of the states."

[3] "The Members of the League who are bound by the Paris Pact must preserve all the rights which are theirs under the latter instrument." "The Paris Pact simply condemns war 'as an instrument of national policy', without prohibiting . . . the execution of international police measures." "Accordingly the Council should be left the greatest possible freedom in its choice of methods for ensuring the execution of awards or judicial decisions." "No limits can be laid down. Everything depends on the circumstances. The Council must be relied on to act with the necessary prudence and firmness." "An obligatory decision (of the Council) could not be left in danger of not being executed."

From a merely debating point of view it is easy to question the necessity of some of the proposed changes. How, for instance, does an instrument which provides for sanctions in some cases become more harmonious with another instrument which provides for sanctions in no cases by being modified so as to provide for sanctions in all cases? If resort to war cannot fittingly be prohibited without methods of compulsory settlement being put in its place, how comes it to be prohibited where the Council is not unanimous or the dispute arises out of a matter of domestic jurisdiction? If "in default of any other solution" of its dispute a state may be led, even lawlessly, "to adopt a warlike attitude", will the position be easier if another solution of some sort, having been compulsorily arrived at, is felt to be unacceptable?

But a student will do better to give his mind to the question: What is meant by that "organic character" of the Covenant which will, it seems, be better safeguarded by the new set of amendments than it would have been by those at first proposed? For either this phrase represents a definite theory and is the key to the detail of the changes, or else it is merely a pretext for once more putting forward certain principles[2] that have hitherto failed, though not for want of advocacy, to find a home in the constitutional fabric of the League.

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[1] . . . "Convinced . . . that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty."

[2] i.e. the principle of the compulsory solution even of non-justiciable differences (under the existing Covenant neither party need accept the recommendations of the Council), and the principle of the collective coercive enforcement of the solution so obtained.

To think of the Covenant procedure for the pacific settlement of disputes as prejudiced by the Peace Pact (and what else can be meant by the suggestion that the Covenant cannot simply adopt the Peace Pact without detriment to its own "organic character"?) seems to be to conceive of it as assigning an essential value to the diplomacy of force, relying for its effectiveness on the fear of ultimate military defeat, unacquainted with any influential argument other than the threat of war. Remove that fear of defeat, and the intransigent will be stiffened in his intransigence; disputes will simmer on indefinitely. Consequently, the Covenant system having even now (for the Peace Pact is already in force) been deprived of its vital energy, we are left in effect with no living system at all; and the need to-day is for the institution of a new system, a system which must be allowed to embody several ideas that failed to establish themselves in 1919 under the chairmanship of President Wilson.[1] From some source there must be available the vital energy, the steam to turn the turbine, the fear to ensure respect for compulsory pacific solutions, the possible threat of force—not sanctions against war, but "international police measures" against passive resistance. Now this, if not very idealistic, is a perfectly intelligible view, and it is well that it should be understood and pondered on its merits. The phrase "organic character" is very far from being a mere pretext.

The underlying philosophy of the Peace Pact—and it *has* an underlying philosophy, though the point is not conceded in the Committee's report—does not assume the need of a permanent external source of energy; it does not call for the 'institutionalization' of collective pressure. The Peace Pact, in short, was put forward, not as a faltering first step towards the piecemeal creation of a new and bigger version of the Covenant, a more thorough-going application of that principle of centralized authority and pooled strength for which M. Bourgeois had argued in 1919, but as containing a complete policy coherent in itself. No Government which thought in terms of sanctions, international police measures, and compulsory arbitration, could, without hypocrisy, have issued the invitation that went forth over the name of Mr. Kellogg.

A third possible theory in regard to the proper basis for a living system of peace can be found in a quotation from the speech delivered by Lord Robert Cecil (as he then was) at Birmingham on the morrow of the armistice in 1918: "The most important step we can now take is to devise machinery which in case of international disputes will, at the least, delay the outbreak of war and secure full and open discussion of the causes of the quarrel. . . . That [the interposition of a delay] is the essential thing, and to secure it, the treaty would require each of the signatories to use their whole force, economical as well as military, against any nation that forced on war before a conference had been held. To that extent and to that extent only, international coercion would be necessary".[1] This conception, which some regard as the true essence of the Covenant, can welcome the Peace Pact as a natural ally which, by improving the atmosphere, lightens the task without at any essential point affecting the technique of Covenant procedures.

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[1] Cf. Hunter Miller, *The Drafting of the Covenant*, Vol. I, *passim.*

Assuming that the above interpretation of the phrase "organic character", read in the light of the proposals it accompanies, is a fair one, it will be seen that the conception it implies of the nature of the League is merely one of various possible conflicting conceptions, none of which has pretensions to universally acknowledged orthodoxy. But, while it has yet to be proved that the existence of the Peace Pact will in practice militate against the solution of acute international differences, the converse is at least equally true. If 'private' war, besides being unlawful and therefore officially 'unthinkable', becomes politically impracticable too, the environment in which the League has in future to live will be of a nature hitherto unknown and one in which the Covenant in its present form would hardly have been framed. Can we afford to "wait and see"? Will that be to miss a golden chance of protecting the Peace Pact from undue strain by forestalling the appearance of the sort of situation in which war, however unlawful, begins again to be thinkable none the less? May it not be that by strengthening the hand of the League Council we should be giving the Peace Pact its best hope of proving a reality? If "pruning out the dead wood" is useful, "building up foundations" may be more important still. While verbal harmonization may seem a fad for purists, a movement avowedly looking to a reinforcement of the Peace Pact and a modernization of the Covenant to adapt it to the needs of a new phase in human affairs may command general support.

In any event, let us consider what might be the effect of voting and ratifying the Committee's amendments as they stand—for after all there is nothing final about them. The main case for the "ayes" is in the report. One cardinal point, however, which might by some be considered to tell in favour of the changes, receives no mention in the report, so that it may perhaps be wondered whether it arose in discussion at all. It is that, whereas on a disputed legal point the Council is expected, as a matter of course, to consult jurists or the Court, and whereas arbitration tribunals in general are required to affirm the legal status quo, there seems to be nothing in the terms of the proposed amendments which would prevent the unanimous Council from requiring a disputant Member state to proceed to a revision of its treaties. A notable innovation —if it is intentional.

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[1] Quoted from *The Problems of Peace*, 1927, p. 25.

Then there is the extension of the 'sanctions' system to cover every recourse to 'private' war. Article 16 is a topic on which confused thinking is all too easy. It is said to be valueless because never yet actively applied. It is described as punitive, whereas its action would be essentially, if not solely, to bring the aggressor to a standstill. It is discussed as if primarily intended to function actively, whereas its main purpose surely is to serve as a deterrent. It is thought of as holding states to a promise to desist from private war, whereas it has its chief importance in relation to a promise, not of absolute abstention, but of a provisional abstention and postponement until after a discussion at the Council table. Article 16 in fact at present exists more in order to canalize the dangerous disputes—steering them in the direction of the ultimate gap, a gap that can be approached only through an interval of Geneva investigation—rather than for the purpose of preventing, where Council statesmanship has, *ex hypothesi*, failed otherwise to prevent it, their finally leading to war. So long as there remains on paper this gap in the 'sanctions' arrangements, your hypothetical 'aggressor' will have some sort of inducement to forgo the strategic advantages of a surprise attack. Universalize the scope of Article 16 and, unless he sees hopes of convincing the whole Council, your aggressively minded statesman will do better to pick his moment—not e.g. during September—and present the League with a *fait accompli*.

The effectiveness of Article 16, even within its present modest sphere, depends on the confidence (or apprehension) statesmen feel that there would be no hanging back. Hanging back would be least likely in the cases where the public conscience was most deeply shocked. The restraints imposed by the terms of the existing Covenant are relatively so light and so easy to respect that the sanctions presuppose violence of a particularly cynical sort. Though voices object, even now, to the article, none of them suggests that the transgressor might not deserve the treatment. Under the amended Covenant the transgressor might well be a state whose cause on its merits commands general sympathy.

Then again there is the perennial difficulty of determining the aggressor. Unless it is clear, in the day of battle, to which of the two or more belligerents the sanctions are duly applicable, the system will contain an element of danger. Under the existing Covenant the question might perhaps not be easy. Under the prospective, amended Covenant cases of difficulty would be even more likely to arise. Indeed, in a case where a division of sympathies in the Council has produced a stalemate, and, after a period of strained relations, hostilities break out, it is only too conceivable that the Council would be divided likewise in its attribution of the blame. Yet there is nothing in paragraph 1 of Article 16 to make the obligation to apply sanctions dependent upon unanimity having been recorded in the Council.

This leads to a further objection. It is well known that in 1921 an unsuccessful attempt was made to amend Article 16. One motive at any rate of that attempt was the desire to mitigate the dangerously automatic character of the system, at least as it appears in black and white in paragraph 1. Many who favour the principle of sanctions controlled by the Council feel troubled about the article in its present form. Many who might be willing enough in principle to extend the field of sanctions, may very well object to an extension of the system prescribed in Article 16.

Of course, as was pointed out by the Danish delegate in the First Committee,[1] there are various ways in which the Peace Pact might be embodied in the Covenant without extending the field of sanctions at all. But to any such proposal there might be heard the impressive retort that a Covenant in which war, prohibited in all circumstances, is to be collectively repressed only in some, would be logically, morally, politically, and aesthetically indefensible.

There is, however, another alternative which might be worth suggesting. Let us assume that Article 16 is to apply to all wars alike. Let us assume that in its less fortunate aspects we shall see

[1] "He thought, however, they might easily avoid that difficulty by appropriate drafting. He ventured to suggest, for example, the addition to the Covenant of the League of Nations of a new Article 17 (*a*), reproducing the Kellogg Pact, but leaving untouched the system of sanctions laid down in the previous articles of the Covenant. Other solutions were also conceivable."

it extended only with regret. Let us assume—as experience requires us to do—that no amendment which should abate by one particle the protection that, on paper at least, the text of the Covenant already promises to the victim of aggression would obtain the necessary ratifications. Is it possible, on all these assumptions, to make some conciliatory suggestion? It would be competent for the British delegation, when the Committee's report is under discussion next September, to propose in the same context an amendment to Article 16. There need not be two classes of wars. Article 16 would apply alike to every war. But the manner of its application would vary with the nature of the evidence. The aggressively minded statesman would have always to reckon with the probability of automatic sanctions, as prescribed in the existing paragraph 1. But, in some at least of the most dangerous, because dubious, cases, a discretion as to their application would lie with the Council, whose duty it would be to formulate recommendations, as prescribed in the existing paragraph 2. Aggression as such would entail sanctions controlled by the Council. "Flagrant" aggression would entail automatic sanctions. And since certain states would be unlikely to renounce anything the Covenant already gives them, all those instances of aggression to which Article 16 already applies would be deemed to be "flagrant". The suggested amended article would run somewhat as follows:

"1. Should any Member of the League resort to war in violation of this solemn covenant it shall be the duty of the Council to recommend to the several Governments concerned what measures of all kinds Members of the League shall severally undertake to protect the covenants of the League, and the Members of the League hereby agree to co-operate loyally and effectively in the protection of those covenants to an extent which is compatible with their military situation and takes their geographical position into account.

"2. Should any Member of the League resort to war in flagrant violation of this Covenant, the Members of the League hereby undertake immediately to subject it to the severance, &c. . . ." as in the present paragraph 1.

"3. Should any Member of the League, being a party to a dispute, resort to war without having submitted the matter either to arbitration or judicial settlement or to inquiry by the Council, or before the expiration of a period of three months after the award by the arbitrators or the judicial decision or the report by the Council, or against any Member of the League which complies with the award of the arbitrators or the judicial decision or the recommendations of a report by the Council which is unanimously agreed to by the members thereof other than the representatives of one or more of the parties to the dispute, it shall *ipso facto* be deemed to have resorted to war in flagrant violation of this Covenant."

"4 and 5". The existing paragraphs 3 and 4.

A further possible disadvantage of the new régime would perhaps be that individual states represented on the Council might use their power of defeating the search for unanimity in a spirit inimical to the general interest. *Ceteris paribus,* it may be assumed that the greater the temptation to such abuse of voting-power, the greater the risk of its happening. In view of what contingency is there at present such a temptation? that is, for what purposes does the existing Covenant require merely 'exclusive', not 'inclusive', unanimity?[1] The answer is that the state against which an operative 'exclusive' unanimity has been got would, prior to the Paris Pact, have thereby become disentitled, even after the three months' delay, from attacking its opponent. To frustrate, by corrupt bargaining, the attainment of such 'exclusive' unanimity in a case where it would otherwise have been arrived at, would have been merely to keep alive the legal liberty of embarking upon a war in support of contentions against the merits of which world opinion would lately have become conscious, and given proof, of its substantial solidarity. That legal liberty having been renounced in the Pact, the only boon now to be bargained for is the doubtful privilege of violating the Pact in those unpropitious circumstances without the operation of sanctions becoming technically inevitable.

Under the proposed amendments, the advantage to be improperly bargained for would be that of retaining, on political issues, a free hand in a world of what it is hard to distinguish from compulsory arbitration,[2] the power, that is, of preventing, in a crisis, the adoption of recommendations compliance with which would be not merely obligatory but enforceable by concerted international measures.[3] It would render politically practicable the perseverance of a Member state in policies the merits of which would not bear disinterested examination. It would, as the amendments now read, be the only security for vested rights against any modification on which the other Council states would normally have been able to arrive at a common 'legislative' policy. Under the new régime the temptation would thus be indefinitely strengthened.

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[1] Cf. Article 15, paragraph 6. "If a report by the Council is unanimously agreed to by the members thereof other than the representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report." In all other cases the votes of the interested states have to be *included* (not *excluded*) in determining that the voting has been unanimous.

[2] For it is proposed that the Members shall agree that "if the report by the Council is unanimously agreed to by the members thereof other than the representatives of one or more of the parties to the dispute", they "will comply with the recommendations of the report". Under the existing text they are not bound so to comply; they are merely bound not to go to war with any party to the dispute which does comply with such recommendations.

[3] For "if the Council's recommendation is not carried out, the Council" (it is proposed) "shall propose suitable measures to give it effect".

The possibility that some states might fall to this kind of temptation was evidently not far from the thoughts of those on the Committee. Thus, even on a less crucial point, viz.: the proposing of measures of execution, "some members" thought that "the rule of unanimity . . . might involve serious disadvantages, since the opposition of a single state represented on the Council would be sufficient to prevent the execution of a judicial decision or arbitral award. The Committee recognized the gravity of the question. . . ." And, again, "in order to render the asking of an advisory opinion easier" where "it would be of real importance for the solution of the dispute that the advisory opinion should be requested" so that "the majority of the Council will be very ready to consult the Court", a majority vote is, by an amendment of the Covenant, to be declared sufficient.[1, 2] If there is anything in such anxieties, it means that Member states could be conceived of as falling into two categories, viz. the 'exposed' or 'uninsured' Members—and the 'insured'—those to whose detriment certain provisions of Article 15 would in practice be unlikely to work.

Some of these queries are no doubt far-fetched. Sinister possibilities can be discerned in almost any constitutional scheme. Nor can this article pretend to have touched on all the matters of interest in the recent report. Those, however, who have come to set store by the existing League should be interested to observe what becomes next September of proposals the acceptance of which would at least mean the opening of a new chapter in its history.

TEXT OF THE AMENDMENTS PROPOSED BY THE BRITISH DELEGATION.

Article 12 (1) to be amended to read as follows:

"The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitra-

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[1] The alternative deprecated in both these instances was the rule, not of 'inclusive', but of 'exclusive', unanimity.

[2] There would be some advantages in not proposing to touch the mechanism of advisory opinions at the present moment. True, the Committee explicitly leave "entirely on one side the question whether, as a general rule, a request for an advisory opinion requires unanimity, or may be made by a simple majority". But what is the restricted purpose for which the interpretative amendment is to be adopted? It is for the handling under Article 15 of acute international differences!

tion or judicial settlement or to enquiry by the Council, and they agree that they will in no case resort to war."

Article 13 (4) to be amended to read as follows:

"The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto."

Article 15 (6) to be amended to read as follows:

"If a report by the Council is unanimously agreed to by the members thereof other than the representatives of one or more of the parties to the dispute, the Members of the League agree that as against any party to the dispute that complies with the recommendations of the report they will take no action which is inconsistent with its terms."

Article 15 (7) to be amended to read as follows:

"If the Council fails to reach a report which is unanimously agreed to by the members thereof other than the representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice other than a resort to war."

PROPOSALS OF THE COMMITTEE.

Present text.	*Proposed amendments.*
Preamble.	*Preamble.*
"In order to promote international co-operation and to achieve international peace and security *by the acceptance of obligations not to resort to war.*"	"In order to promote international co-operation and to achieve international peace and security *by accepting the obligation not to resort to war.*"
Article 12, *paragraph* 1.	*Article* 12, *paragraph* 1.
The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision or the report by the Council.	The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will only employ pacific means for its settlement. If the disagreement continues, the dispute shall be submitted either to arbitration or judicial settlement, or to enquiry by the Council. The Members of the League agree that they will in no case resort to war for the solution of their dispute.
Article 13, *paragraph* 4.	*Article* 13, *paragraph* 4.
The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not	"The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered and that they will not take

resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto.	any action against any Member of the Leagues which complies therewith. "In the event of any failure to carry out such award or decision the Council shall propose what measures of all kinds should be taken to give effect thereto; the votes of the representatives of the parties shall not be counted."
Article 15, *paragraph* 6. If a report by the Council is unanimously agreed to by the members thereof other than the representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.	*Article* 15, *paragraph* 6. If the report by the Council is unanimously agreed to by the members thereof other than the representatives of one or more of the parties to the dispute, the Members of the League agree that they will comply with the recommendations of the report. If the Council's recommendation is not carried out, the Council shall propose suitable measures to give it effect."
Article 15, *paragraph* 7. If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.	*Article* 15, *paragraph* 7. "If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the representatives of one or more of the parties to the dispute, it shall examine the procedure best suited to meet the case and recommend it to the parties."
	Article 15, *paragraph* 7 *bis.* (New paragraph.) "At any stage of the examination the Council may, either at the request of one of the parties or on its own initiative, ask the Permanent Court of International Justice for an advisory opinion on points of law relating to the dispute. Such application shall not require a unanimous vote by the Council."

NOTES

THE INTERNATIONAL COPYRIGHT CONFERENCE[1]

By Sir W. HARRISON MOORE, K.C.M.G., Emeritus Professor of Jurisprudence in the University of Melbourne.

THE International Copyright Conference at Rome in May 1928 was of special interest to the countries within the British Empire, as being the first held since the Imperial Conference of 1926 to which the international conference and treaty resolutions would apply. When invitations for the Conference were first issued, they were forwarded to those Dominions in which the Conventions of 1886 or 1908 operated in virtue of an adhesion in respect of such Dominions by His Majesty on the advice of the British Government. But these adhesions under the Colonies and Possessions article of the Convention did no more in substance than extend the area of application within His Majesty's Dominions; they in no way affected the membership of the Copyright Union. While the constitution of the delegation was a matter of internal concern for the British Empire, it was clear that there could be only a single delegation corresponding with the single membership of the Union. If the Dominions were to be separately represented, it could only be if they entered upon a new relation to the Union, and became members of it under the article of the Convention providing for the adhesion of new members.

The first to act was the Irish Free State, whose position was peculiar, in that the Convention had applied to her territory, not in virtue of any adhesion under the Colonies and Possessions article, but under the original ratification by His Majesty, and there was some doubt whether, under the changed political conditions, the Convention continued to apply in the Free State at all, though if the doubt were well-founded, it might seem to raise difficulties in regard to the rest of the United Kingdom. But there was sufficient reason in the natural desire of the Free State Government to be separately represented, and the Free State was duly admitted a member of the Union at the end of 1927. Applications from Canada, Australia, New Zealand, and India followed, and in the spring of 1928 they were severally detached from the application of the Colonies and Possessions article of the Convention, and, through His Majesty on their behalfs, were recognized as members of the Union. There were thus six separate delegations accredited to the Conference under full powers issued by His Majesty. South Africa did not become a member.

It remained to carry out the resolutions of the Imperial Conference of 1926 both in respect of the consultations of the delegations and the form of the Convention. Consultation both before and during the Rome Conference was freely made use of. Compliance with the forms suggested by the Imperial Conference resolutions was not attained without some difficulty, and some apprehensions on the part of the Bureau at Berne and the delegates of other countries. The principle that the Convention should be in the names of heads of states rather than of states themselves was readily accepted. The constitutional inference that obligations undertaken in an international convention in the King's name on behalf of the various Governments within his Empire did not create any obligation between these Governments *inter se* was not contested, but the textual amendments suggested as appropriate in view of this principle and inference—the substitution of the expression "High Contracting Parties" for "members of the Union" or "contracting countries"—were refused as threatening or casting doubt on the continued existence of the Union as a permanent international administration with a juristic personality, and as assimilating the whole arrangement to a mere multilateral treaty. A compromise was found in the adoption of the term "countries of the Union".

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[1] The Editors greatly regret that this contribution reached them too late for insertion in last year's issue of the *Year Book*.

In respect of the signature of the Convention, the delegates holding a full power from the King signed in immediate succession, beginning with those for Great Britain, as contemplated in the resolutions of 1926. The Irish Free State was of the opinion that, as the Copyright Union was associated as an administrative union with the Industrial Property Union, the precedent of the Industrial Property Convention, 1925, should be followed, and the signatures should be in the alphabetical order of the countries of the Union, unaffected by the fact that some of them were under one and the same head. The delegates of the Free State, therefore, withheld their signatures.

Apart from the important and delicate questions of a constitutional kind in which all the members of the British Commonwealth were interested, there was a special matter of form which concerned Canada and Australia, as countries with a federal constitution. In these countries "copyright" is assigned to the federal legislature. But *droit d'auteur* has a larger and less definite significance, and some of the proposals made (such as the *droit moral* and the general protection of *œuvres orales*) and perhaps some of those adopted would not be within the competence of the federal legislature. To assume obligations the performance of which depended on state or provincial action would involve the postponement of ratification on behalf of these countries until such time as the whole of the provinces or states had passed legislation which, in the opinion of the Dominion or Commonwealth Government, was adequate for the performance of the Convention. Such a position would put it in the power of any one of these authorities, by inaction, to prevent ratification indefinitely or altogether. Accordingly, on the model of the Statute of the International Labour Office at Geneva, a declaration was made on behalf of Canada and Australia that where any matter in the Convention lay outside the competence of the federal legislature, the obligation on the part of the signatory Government was merely to recommend the matter to the competent authorities. The declaration was accepted by the Conference. Similar considerations would of course arise if the United States became a party to the Convention.

In most international matters, the common interests of all are accompanied by certain special interests, which may give a very different value in different countries to the same right. This is most obvious in such matters as migration, where the same provisions of an international code would have very different practical effects in countries of emigration and in countries of immigration. So, in copyright, it was found that various interests had become predominant in particular countries and had taken on a national character. Australia and New Zealand were described, not ineptly, as "consumer countries" in contrast with the "producer countries", in art, music, and literature. This is true in a deeper sense than first appears. In countries of wide spaces and isolated settlers, the problem of settlement includes the promotion of social intercourse and of access to the means of aesthetic and intellectual culture. The telephone and the motor-car—to-morrow, the aeroplane—the gramophone and the radio, have a social value in these countries which it is difficult to exaggerate. At Rome, the peculiar interest of "new countries" in the modes for performance and transmission of works of the intellect was manifested by the activity of Australia and New Zealand in relation to the provisions of the Convention, actual or proposed, regarding the performing right and the radio, and in the uses of mechanical reproduction in relation to both. The author's right in respect of the performance of musical and dramatic works was not contested, nor was there any objection to the explicit recognition of an author's rights to the transmission of works—not limited to the performance of musical and dramatic works—by radio. But it was considered that the mode in which these rights were exercised—the concentration of a vast and indefinite number of works in the hands of a single society—give opportunities for harsh and oppressive use. It formed an interesting question in the Conference how far the power to control abuse of rights secured by international convention was inherent in every state and must be deemed to be reserved by implication, and how far also the explicit reservation to the signatories of a police power exercisable in the case of such matters as treason, public decency, and the like, extended to cases where the act or abuse complained of arose not from the mere fact of publication or performance, but from the very right conferred by the convention, in this case the right to control performance or representation. The Australian and New Zealand delegates pressed for an explicit recognition of the power to control abuse, as an addition to or qualification of the existing Article 11 (the "direct" performing right); they resisted any weakening of the power of control given by Article 13 (mechanical instruments for recording musical performances); and they declined to agree to the new Article 11 *bis*, for the protection against broadcasting, in the form in which it was presented, viz. as an unqualified recognition of the author's right, which might weaken existing powers of control in the national legislature. The other British delegations, though not so specifically instructed in these matters as the Australian and New Zealand delegates, were in substantial accord, and both in the Conference and in consultations lent their aid. In the end the rule of unanimity made it clear that Articles 11 and 13 must remain unaltered. The new article regarding broadcasting was the subject of numerous attempts at agreement. The difficulty arose in part from differences in English and French legal notions: when, for instance, the French offered to qualify the proposed right by a recognition of the power of national control limited to *l'ordre public*, there was no corresponding category of English legal thought which would represent the idea, or language that would express it—public order would be too narrow and public interest too wide. The final agreement contained in Article 11 *bis* recognizes the author's exclusive right in the broadcasting of his work, and, adapting the language of Article 13, provides that the national legislature may regulate the conditions of the exercise of the right, such conditions to be strictly limited to the countries which have established them, and that in no case is the right of the author to a reasonable remuneration to be impaired. The *droit moral* of the author is also reserved from the power of regulation. But the *droit moral* and all that belongs to it is another and most interesting story, upon which this note must not intrude.

L'INSTITUT DE DROIT INTERNATIONAL

THE thirty-sixth session of this body of international lawyers was held at Briarcliff Manor in the State of New York from the 10th to the 18th October, 1929. It was a memorable meeting, as being the first time that the *Institut* had met out of Europe. The session in America was rendered possible by the generous assistance of the Carnegie Endowment for International Peace, whose guests the members of the *Institut* and their wives were from the time that they set foot on the s.s. *George Washington* at Bremen, Cherbourg, or Southampton until their return on the s.s. *America*. Before speaking of the scientific work accomplished, a few words must be said of the warm welcome and profuse hospitality accorded to the large party of over ninety persons during their stay in the United States. After the conclusion of the session, visits were paid to New York, Princeton, Philadelphia, and Washington. At the last place, the *Institut* was accorded the signal honour of an invitation to the White House, where the President of the United States and Mrs. Hoover received the members and their wives and entertained them to tea. It is impossible not to mention the hospitality accorded to the visitors by Dr. Nicholas Murray Butler, President of Columbia University and Chairman of the Carnegie Trustees, and Mrs. Butler; the Chancellor of the University of New York; the Hon. George Wickersham, President of the University Club of New York; the Bar Association of New York; the President of Princeton University; Professor and Mrs. Marshall Brown and the Governing Body of the Pan-American Union at Washington. Dr. James Brown Scott, the President of the *Institut*, and Mrs. Scott, together with the members of the Reception Committees and the staff of the Carnegie Foundation, were indefatigable in their exertions for the comfort and well-being of their guests.

Simultaneously with the meetings of the *Institut*, a conference of teachers of International Law in the United States was held at Briarcliff Manor, which afforded an opportunity to the members to join in the interesting discussions of that body, and also to make the acquaintance of the large number of men who are engaged in the important work of advancing the knowledge of International Law in America. The meetings of the teachers were held in the evening, and rarely ended until midnight. Many of the members of the *Institut*, whilst they enjoyed these opportunities for intercourse with the teachers, sometimes felt that they were an undue strain after the long meetings in which they had already been engaged.

The opening ceremony was attended by Mr. Elihu Root, the Doyen of international lawyers in the United States, who delivered an admirable address on the work of the *Institut*, and by Dr. Nicholas Murray Butler, who welcomed the *Institut* on behalf of the Trustees of the Carnegie Foundation. At the first administrative session, fourteen new Associates were elected, among whom were Sir John Fischer Williams and Professor J. L. Brierly. Their election brings the number of British Associates up to three, the Members being Sir Thomas Barclay (*Membre d'honneur*), Sir Cecil Hurst, and Professor Pearce Higgins, all of whom were present at the session. It may be recalled that the *Institut* consists of sixty Members and sixty Associates; the British representation is, therefore, scarcely adequate.

The subjects discussed were seven in number, viz. the international rights of man; the legal position of companies in International Law; the extension of compulsory arbitration and the obligatory competence of the Permanent Court of International Justice; the clause of compulsory arbitration in the conventions of Private International Law; diplomatic immunities; the problems of the access of individuals to international courts, and the codification of the International Law of Peace.

The results obtained were by no means all of equal value from the point of view of the scientific advancement of International Law. A considerable time was taken in the discussion of abstract doctrines relating to the international rights of man, which in the opinion of many of those present could lead to no practical results and were an echo of eighteenth-century philosophical doctrines.

The *Institut* passed a revised edition of the *Réglement* adopted at Cambridge in 1895 on Diplomatic Immunities. The fiction of exterritoriality was finally abandoned. The difficult problems relating to the position of a new category of persons invested with diplomatic immunities under the Covenant of the League of Nations and other international agreements were not discussed, and the new *Réglement* will probably call for further revision when these questions are dealt with.

The *Institut* adopted several resolutions on the subject of the extension of obligatory arbitration and the competence of the Permanent Court, the most important of which was the *Vœu* that states in their arbitration conventions, as well as in the *clauses compromissoires* signed by them, should all agree to submit to the decision of the Permanent Court all disputes between them on the subject both of the competence of the arbitral tribunal and of excess of power alleged by one of the parties.

The problem of the access of individuals to international courts raised the important question of the recognition of individuals as subjects of International Law. M. Seferiades, the rapporteur, introduced a series of propositions which led to interesting discussions, but the whole subject, on the motion of the rapporteur, was adjourned to a subsequent session. The *Institut* confined itself to passing a resolution to the effect that it recognized that there are cases when it may be desirable that individuals should have the right, under conditions to be hereafter determined, to appeal direct to international courts in their disputes with states.

On the subject of the Codification of the Law of Peace, M. Alvarez presented an elaborate report which time did not permit to be discussed. A declaration presented by him and his co-rapporteur, M. de Lapradelle, was adopted, in which the need for codification was affirmed, and that it should be undertaken in a progressive spirit and with regard to the requirements of justice and the new demands of international life. The declaration laid stress on the resolutions passed by the *Institut* since its foundation as fragmentary drafts, capable, after revision, of being embodied in a code. The *Institut* recognized that Governments were limited by political considerations, whereas a scientific body, such as the *Institut*, could pursue its task in a freer atmosphere, while not losing sight of the actualities of international relations. With this object in view, M. Schucking made various suggestions for the future work of the *Institut*.

In the sphere of Private International Law a short set of resolutions was adopted, dealing with the legal position of companies in International Law. The vexed question of the nationality of such entities was excluded from consideration, and the *Réglement* deals only with the principle of the international recognition of companies, and certain questions of the conflict of laws relating to their constitution, operation and dissolution.

The resolutions adopted by the *Institut* on the clause of obligatory arbitration in conventions of Private International Law, following on a report of M. Strisower, were based on the recognition of the competence of the Permanent Court of International Justice to deal with disputes arising out of such conventions.

At the final meeting of the session, Professor Pearce Higgins, in the name of the British Members, invited the *Institut* to hold its session of 1931 at Cambridge. The invitation was unanimously accepted, and Professor Pearce Higgins was elected President of the *Institut* for that meeting.

A. P. H.

FIRST CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW

This Conference, which was held under the auspices of the League of Nations, met at The Hague under the Presidency of Dr. Th. Heemskerk, a former Prime Minister of the Netherlands, on the 13th March, and terminated on the 12th April, 1930. It was attended by the delegates of some forty-eight states, amongst whom were several states, notably the U.S.A., to whom, although not Members of the League, special invitations had been extended.

Three subjects had, after consultation with the Governments concerned, been selected for consideration, viz.: Nationality, Territorial Waters, and Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners. By way of preparation an elaborate questionnaire on each of these subjects had been circulated, and a Committee of Experts appointed by the League had, after examining the answers to the questionnaire, prepared a number of Bases of Discussion which seemed to them to represent the greatest measure of agreement disclosed by the answers.

As this was the first conference of its kind, questions of procedure and of the form in which the results of the work of the conference should be cast received special attention. The more important decisions on this matter were that meetings of committees should be held in private unless a committee otherwise decided, and that no attempt should be made to prepare declarations of existing international law, but that the Conference should endeavour to draw up conventions setting forth the rules which the various states acceding thereto would agree to apply in their relations with each other.

Each of the three subjects was remitted for the consideration of a separate committee set up by the Conference.

The first Committee (Nationality) alone succeeded in drawing up a convention, which, although by no means complete, contains a number of rules the application of which will avoid certain causes of international friction arising from cases of dual nationality and statelessness.

The convention recognizes that it is for each state to determine who are its own nationals and that states are bound to recognize each other's laws on this subject in so far as they are consistent with international conventions, international customs and principles generally recognized. The question whether a person possesses the nationality of a particular state is to be determined by the law of that state.

Among the other matters dealt with in the convention, reference may be made to the rules laid down to govern the question of diplomatic protection to persons possessing dual nationality; in particular the convention provides that a state may not afford protection to one of its nationals against a state whose nationality he also possesses. Questions of renunciation of nationality and the effect of expatriation permits are regulated, as are also those relating to the nationality of children of diplomats and consuls, to the effect on the nationality of children of legitimation and of the naturalization of their parents, and to the nationality of children of unknown parents. The vexed question of the nationality of married women was the subject of much discussion, and articles were adopted with the object of avoiding, so far as possible, cases of statelessness, of recognizing that the naturalization of a husband shall not cause the wife to change her nationality without her consent, and of providing that on dissolution of the marriage the wife shall only recover on her own application a nationality lost by marriage. In addition to the main convention, three protocols were prepared. The first imposes an obligation on a state to readmit or to bear the cost of maintenance of a former national who has lost his nationality after entering a foreign country but has not acquired a fresh nationality, if he becomes permanently indigent or has been sentenced to at least one month's imprisonment in that foreign country. The second provides that a person possessing dual nationality who habitually resides in and is in fact most closely connected with one country shall be exempt from military service in any other country whose nationality he also possesses; and also that if a person possessing dual nationality would, on attaining majority, be entitled to renounce one of his nationalities, he shall during minority be exempt from military obligations to that state whose nationality he is entitled to renounce, and, further, that loss of the nationality of a state releases the person from his obligation of military service to that state. The third protocol deals with a special case of statelessness arising from birth on the territory of a state where the father is without nationality or is of unknown nationality.

A number of *Vœux* were also adopted, of which the more important were to the effect that every attempt should be made to give full effect to the principle that every person should have one and only one nationality, and that states should consider the adoption of the principle that the nationality of a woman should not be affected without her consent by the mere fact of marriage.

The second Committee (Territorial Waters) found that the question of the extent of the territorial sea, over which the sovereignty of a state is to be recognized as extending, was for the moment incapable of solution. They accordingly prepared a report containing a number of juridical articles defining the nature of the right of innocent passage through the territorial sea both as regards warships and other vessels, the extent of the jurisdiction of the coastal state over vessels exercising that right, and the nature of the right of hot pursuit.

The Committee recommended that the Governments should be invited to continue the examination of the subject in all its aspects with a view to the convening of a new Conference, and suggested that the above articles, together with certain others annexed to their report, which had been prepared by a technical sub-committee for the purpose of defining such matters as the low water mark, bays, and islands, would afford a suitable starting-point for the further discussion of the problem.

The third Committee (Responsibility of States) were not able to present any report to the Conference. A fundamental divergence of view on the principles involved was disclosed, and the time available was not sufficient to enable a compromise to be reached on a question admittedly of great difficulty and one which moreover must necessarily be treated as a whole.

Although the progress made by the Conference may thus have fallen short of the legitimate hopes of those responsible for summoning it, the general view, expressed by the President in his concluding speech, was that the discussions have enabled the various Governments concerned better to understand each other's point of view and have thus provided a new starting-point from which the ultimate solution of the problems involved may hopefully be sought.

THE PERMANENT COURT OF INTERNATIONAL JUSTICE. MR. STIMSON'S VIEWS

THE correspondence exchanged between President Hoover and Mr. Stimson as Secretary of State, on the subject of American accession to the Protocol of Signature of the Statute of the Permanent Court, is of more than transatlantic interest. We spoke last year of the importance and significance of the step which has now been taken by the President and which will, we trust, have received Senatorial approval before these lines appear in print. This year we would draw the attention of our readers to the following illuminating passage—not hitherto fully reported on this side of the Atlantic—in Mr. Stimson's explanatory letter to the President (November 18, 1929); in it the Secretary of State gives admirable expression to what the present writer for his part believes to be the sound doctrine as to the functions and utility of a World Court and its place in the contemporary development of international law.

> "By this event" (i. e. the execution of the Pact of Paris), says Mr. Stimson, "not only has the need of developing judicial means instead of war to settle the inevitable controversies between nations become more pressing, but it has become even more important to establish and clarify the standards and rules of international conduct by which such controversies can be prevented or minimized. Never has there been a period in the world's history when there was such an imperative need for the development of international law by an international court. Admitting freely all that must be accomplished towards this end by the quasi-legislative action of international conferences which may meet to discuss and agree upon international compacts and codes, it is nevertheless to the judicial action of a World Court, passing upon the individual controversies which arise between nations, that we must look not only for the application and interpretation of these compacts and codes but for the flexible and intelligent development in this way of all the subsidiary principles and detailed rules which will surely be found necessary in such application.
>
> "No people are more familiar with this need than the American people, or have greater reason for confidence in this judicial method of developing the law of conduct between separate states. They have seen their own Supreme Court wisely and flexibly work out the myriad difficult and changing problems which in the course of one hundred and forty years have grown out of the compact in which thirteen sovereign states in 1787 agreed to settle their relations by pacific means. And they have seen that Court settle these problems between states with no other power or sanction than the mandate of such a compact and the force of public opinion.
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> "We cannot frankly face the limitations which inevitably inhere in the process of enacting laws or creating public compacts—so evident even in domestic legislation; so certain under the much more difficult conditions of international conferences—without appreciating that in this process of interpretation and application, the World Court will perforce take a vital part in the development of international law. The standards set up by international conferences will hardly be able safely to go beyond the statement of broad general principles; the development of details will necessarily grow out of the application of such principles by the Court. Here again to the American brought

up under the common law, patiently and intelligently evolved by six hundred years of judicial decisions, this will be familiar as the method by which a system of law can be most safely, flexibly, and intelligently produced."

No more authoritative comment has ever been made on the comparative functions and usefulness of the international "legislative" conference and the Court of International Law.

We may compare, but luckily not contrast, with this statement, what the British Government said in its Memorandum on the Optional Clause (Misc. No. 12, 1929, Cmd. 3452, para. 13)—

"While there are doubtless certain branches of international law which are suitable for codification, His Majesty's Government believe that the method of building up a body of law by a series of legal decisions, a method which produced the English Common Law, may be the more suitable for at any rate some important branches of the Law of Nations."

J. F. W.

"THE WORLD COURT AS A GOING CONCERN"

The American Bar Association Journal, March 1930, published an address by the Hon. Charles Evans Hughes, formerly a judge of the Permanent Court and now Chief Justice of the United States, "The World Court as a going Concern". By the kindness of the Journal, the *Year Book* is permitted to print the following intimate account of the working of the Court:

"Immediately at the close of the oral argument, the Court goes into conference for the purpose of determining whatever preliminary questions are involved, that is, in relation to the jurisdiction of the Court, or with respect to the interpretation of the special agreement submitting the case to the Court, where question has been raised as to what is really before the Court for decision. This conference is entirely preliminary and as soon as the Court has decided, and this does not generally take very long, as to what questions are before it, a day is fixed for the submission of preliminary or tentative opinions. Thereupon each judge, before any consultation among the members of the Court as to the merits, proceeds to write a preliminary opinion, or note, on the facts and the law. This is rather a thrilling experience. It is a practice that could be had only in a court with abundant time at its disposal. But I confess that I sometimes wish that every member of our courts were required after an argument to write out an opinion as a basis for the consultation. No judge cares to appear at a disadvantage, although the opinion, or note, as it is called, is only tentative. He does not care to disclose a failure to study the case or to apprehend its points, or to appreciate the weight of the respective arguments. His mentality is somewhat at stake as well as the controversy. The result is that he is likely to pay close attention to the oral arguments, to examine with care every document, to consult each important authority; he may even analyse the oral arguments as he has them day by day; he keeps thinking about crucial points, awaiting with deep interest the development of the argument. The case absorbs all his waking thought and when the argument is over he is likely to have a fairly clear idea of the case and to have shaped his views regarding it. Of course, judges in all courts differ. Some jump very quickly, perhaps too quickly, to conclusions, others find it difficult to jump at all. Some go directly to the point at issue and are disposed to brush aside philosophical inquiries that are not essential to the determination. Others may be more inclined to consider questions from the standpoint of eternal postulates and to work their way gradually from these to the particular dispute. It is the meeting of such minds, particularly in an international court, which gives to litigating Governments ground for confidence and keeps before the world the ideal of international justice.

"As I have said, each judge in his own sanctum works on his own opinion, knowing that it will be analysed and eviscerated by equally if not more able men who have studied the case with the same attention. Generally five or six days, or perhaps a week are given for the preparation of these preliminary opinions. They are filed with the Registrar of the Court and circulated in confidence to the members of the Court; a day or two is given for their consideration and then the Court meets in consultation. The President of the Court prepares the agenda for the consultation, listing every point of fact or law that is involved in what he believes to be a satisfactory order. This is circulated. The judges meet and first decide whether they will accept or amend the agenda. Each point is then taken up and discussed. It is discussed, even as counsel have discussed the case, without limit of time until, with all the courtesy that is due to brethren who differ, it appears that a vote should be had. Then a vote is taken on the particular question and the conference proceeds to the next point on the agenda. In this way, day after day, with long hours from morning to evening, the Court sits in the most intimate and candid discussion until finally the last question is reached and the vote is taken which decides the controversy. Thereupon, immediately and without either oral discussion or nominations, two members of the Court are selected by secret ballot to join the President of the Court in drafting the judgment of the Court in accordance with the majority vote. This committee immediately goes to work. It decides its plan of action according to the convenience of its members. By uninterrupted activity it prepares a draft judgment that suits the committee. The judgment recites the proceedings leading up to the hearing of the case, the points of fact, the various points of law; it discusses the questions, sets forth the determinations of the Court on each question, and then finally gives its award. The committee circulates its draft of the judgment and a couple of days are given to the other members of the Court to file in writing any amendments they propose. The committee considers these amendments, decides what it will accept or reject and circulates its revised draft. A conference of the full Court is then called for discussion of the draft. It is read like a legislative bill. Any point of objection is discussed and voted upon until finally the form of judgment has received the approval of the majority of the Court. A day is then fixed for a second reading on which dissenting opinions are required to be filed and, in the light of these opinions, the second reading is had and the final vote taken. Counsel for the respective parties are informed, the Court meets, hands down its judgment and calls the next case. The judgment of the Court, I should remind you, has no binding force except between the parties which have submitted the controversy to the Court and in respect of that particular case.

"This, you will see, is extremely deliberate procedure, but nothing could be more important than deliberateness and thoroughness in the disposition of international controversies, where not the fortunes of individual litigants are at stake but the future course of Governments which have been unable to reach an accord as to their mutual obligations."

DISSENTING OPINIONS OF NATIONAL JUDGES AND THE REVISION OF THE STATUTE OF THE COURT

In September 1929 the Assembly of the League of Nations adopted a number of amendments to the Statute of the Permanent Court of International Justice, the main purpose of which was to strengthen the structure of the Court as a truly permanent tribunal. No substantial alteration was made in Article 31 of the Statute relating to the right of parties to disputes before the Court to appoint a judge *ad hoc* if there is no judge of their own nationality on the Court. The committee of jurists, which was entrusted by the Council of the League with the task of submitting a report on the revision of the Statute and which sat in March 1929, had, *inter alia*, under consideration the proposal to revise Article 31 with a view to abolishing the institution of national judges, but, after a somewhat animated discussion, it decided to propose no change in this respect. In the same year the judgments delivered by the Court once more drew attention to the question of national judges and the dissenting opinions delivered by them. In the three cases in which in the course of that year there was occasion to have recourse to the provision of Article 31 of the Statute, the judges *ad hoc* dissented from the judgment of the majority given against the state who nominated them. In doing so they followed what seems now to have become a well-established precedent, as will be seen from the following survey of the work of the Court in this respect. Between the years 1923 and 1928 the Court delivered thirteen judgments, two of which (Judgments 3 and 4) were given by its Chamber for Summary Procedure as provided by Article 29 of its Statute and Articles 67 and 70 of its Rules of Court. In the remaining eleven cases one or both parties had no nationals of their own on the Court, and they availed themselves of the right to appoint a judge *ad hoc*. In three of these cases (Judgments 2, 5, and 9) the state which appointed them was successful wholly or in part, and they voted with the majority. The eighth Judgment does not disclose the names of the dissenting judges. In the remaining seven cases the Court found against the states represented by national judges, and in all these cases the nominees *ad hoc* delivered dissenting opinions against the judgment of the majority. The three cases in 1929 mentioned above complete the picture.[1]

It is submitted, with the greatest respect and without impugning the motives of the national judges in the fulfilment of their judicial duty, that the above analysis of dissenting opinions reveals a disquieting state of affairs which calls for reflection. It shows conclusively that, whatever may be the postulated function of and the services rendered by the national judges in the course of the deliberations of the Court, it has proved impossible to avoid the grave danger of the temporary judges of the Court being looked upon as representing the interests of their states. We are not concerned here with the question whether the national judges have been actually called upon to render the services which are usually assigned as their *raison d'être*—for instance, that they acquaint the Court with the system of jurisprudence and the legal outlook of their country so far as it bears upon the case before the Court—and whether this task cannot be equally well performed by other persons in the course of the written and oral proceedings. For, whatever the usefulness of the national judges may be in that direction, it is overshadowed by the manner of the actual exercise of their judicial vote as disclosed in the somewhat melancholy statistics compiled here. It is not suggested that there have been no grounds of legal substance behind their vote, but the fact is profoundly disturbing that (barring the doubtful case of the eighth Judgment) in no case have national judges voted against their state where it was successful, and that in no case have they refrained from expressing their dissent when the Court rejected the view of their Governments. In several cases the situation was aggravated by the circumstance that the dissenting opinion was delivered against the unanimous (Judgments 6, 7, and 8) or practically[1] unanimous (Judgment 14) view of the Court. In the latter cases the national judge based his dissenting opinion largely on the ground that the Court had no jurisdiction, notwithstanding the fact that the case came before it by virtue of a special agreement.

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[1] The right to appoint judges *ad hoc* in case of advisory opinions was established only in 1928, and it is therefore not necessary to refer to them here.

It would be not only unjust but also misleading to attribute the exclusive responsibility for the present state of affairs to individual national judges. The grave responsibility rests with the dualism of a system which excludes, as a matter of fundamental principle, any idea of representation of interests, except those of the law, on the part of the permanent body of the judges and which, notwithstanding the requirement of a declaration of impartiality, admits in fact the idea of representation of national interests on the part of the non-permanent judges. It would be both idle and inaccurate to deny that the latter are, by the very nature of their function, under a definite obligation to their state to explain its views to the Court. When, therefore, they preface their dissenting opinions by a reference, whose sincerity cannot be doubted, to the dictates of conscience bidding them to record their dissent, it may be difficult to decide whether the reference is made to the duty of judicial impartiality, rendered problematical by the dualism of the system, or to the obligation to represent the interests and to put forward the views of their Governments. The border line between explaining the legal views and defending the interests of the state concerned is in such cases so shadowy as to become utterly unreal. No one who studies the record of the proceedings of the Committee of Jurists who in 1920 drafted the Statute, or of the Committee which in March 1929 considered the question of its revision, can fail to realize that the idea of representation of interests underlay in a decisive manner the entire conception of national judges. This point of view seems now to have definitely prevailed. In the unrevised Statute there was still doubt whether national judges were expected to conform to the requirements of Article 16 of the Statute—at least in the French text[2]—which laid down that the members of the Court must not exercise any political or administrative function in their respective states. This doubt was removed when in 1929, in the case concerning the Brazilian Federal Loans contracted in France, the French Government nominated as judge *ad hoc* the then Legal Adviser to the French Ministry of Foreign Affairs. Formally the French Government was represented in this case by the then Assistant Legal Adviser to the Ministry of Foreign Affairs, who was thus called upon to plead before his official chief acting in the capacity of a judge. The revised Article 31 quite clearly imposes no limitations in this respect, and there is now nothing to prevent a state from nominating as its national judge its official legal adviser, its minister for foreign affairs, or any of its civil servants. It is true that, in the course of the discussion in the latter committee, the opinion was expressed that the circumstance that a nation has a judge of its own on the Court may increase its confidence in the proceedings of the Court and make it less disinclined to accept an adverse verdict. However, an argument of this nature touches the very heart of the problem by revealing the fact that the idea of representation of interests has not yet been eradicated. Only its total eradication can remove the main reason for the insistence on the retention of national judges, and do away with the vicious circle in which the existence of national judges perpetuates the conception of a court whose judges represent interests of their states, and in which that conception in turn tends to entrench judges *ad hoc* as a permanent institution.

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[1] The explanation of the two other dissenting opinions in this case will, if we may say so without disrespect, be found in Judgment 15 and the dissenting opinions there delivered.

[2] There was a curious discrepancy between the French text which spoke of "les membres de la Cour" and the English text which spoke of "the ordinary members of the Court". However, even in the English text it was not quite clear whether the word "ordinary" meant permanent members of the Court, or whether it was intended to cover all judges except deputy-judges.

There is a fatal lack of rationality in a system which, while, in view of the size of the Court, conferring little actual benefit on the state appointing a national judge—in no case, not even in the *Lotus* case, did the vote of the national judge exercise a decisive influence[1]—by necessity threatens to imperil the quality of absolute disinterestedness which is essential to the effective functioning of the Court as a tribunal endowed with and exercising jurisdiction in matters of importance for the peace of the world. President Huber, when opening in 1925 the Second Presidential Session of the Court, referred to the great responsibility in this respect of the members of the Court, a responsibility which, he said, would be too difficult to bear but for the consciousness that "so long as our (the judges') labours are devoted to the Cause . . . we are sustained by a force which is not merely our own."[2] The creation in the Permanent Court of a body of judges, regarded by the opinion of the world as conscious of their position in the hierarchy of international organization, and developing, and enabled by their status and organization to develop, a sense of priesthood in the service of an idea transcending any particular interest, continues to be at the present time of supreme importance for the international community. This last sentence has all the disadvantages of a high-sounding phrase, but it is believed nevertheless to give expression to the fact that the problem of putting beyond any possible doubt the impartiality and disinterestedness of the highest international tribunal constitutes perhaps the most vital question of obligatory arbitration. All objections to obligatory arbitration can ultimately be reduced to the lack of sufficient confidence in that quality essential to any court. The objection based on the absence of clear and ascertainable rules of international law would lose its force if there were no doubt as to the spirit in which the Court will fill the deficiencies and clarify the law. The objection based on the existence of so-called political disputes involving the independence and vital interests of nations would have little justification if it were certain that the fundamental principles of international law, whose primary object it is to protect that very independence and the vital interest of nations, will be given effect in the spirit of absolute impartiality. The objection based on the absence of an international legislature modifying and amending existing law would become reduced to its proper proportions if there were no doubt as to the manner of the exercise by the Court of the function of judicial legislation which is inherent in every judicial activity, but which is of particular importance in international law. The objection based on the assertion that, contrary to municipal law, there is no community of legal outlook and legal convictions between the court and the states subject to the law would be removed if the universally acknowledged high impartiality of the Court in itself constituted clear proof and guarantee of a community of international legal outlook.

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[1] It will be noted, however, that although in this case the vote of the Turkish judge had no decisive effect in regard to the actual decision of the Court, it did have the effect of giving to the world, with the authority of a formal majority of the Permanent Court, approval of a doctrine of great importance which some believe to be mistaken.

[2] *Publications of the Court*, Series C, No. 7 (1), p. 18.

The revision of the Statute by the Assembly in 1929 was to a large extent intended to improve the personal status of the judges and to add to the safeguards of their judicial independence, dignity, and integrity,[1] and these amendments constitute a good reason for satisfaction for all those who have the authority of the Court at heart. However, the securing of the personal integrity and independence of the judges of the Court solves only one part of the problem. The perfecting of their political impartiality and the securing of their independence of purely national considerations and sympathies is of even greater importance because of the impossibility of achieving this end through formal safeguards. This is a problem of the creation in the minds of judges of a sense of international solidarity, resulting in a clear individual consciousness of citizenship of the *civitas maxima*, a development on which it would be inappropriate to offer advice or suggestions. But at least it can be said without impropriety that that process must not be impeded by the continuance of formal institutions perpetuating the idea of representation of national interests. National judges are such an institution. It is not denied that their abolition presents a problem of extreme difficulty. Formally, considerations of nationality do not enter into the question of election of judges, but so long as by tacit convention and for political reasons, whose cogency and expediency are obvious, Great Powers are certain of being actually represented on the Court, it is not easy to urge smaller nations to give up a right to which they attach importance. Neither can a proper remedy be found in a modification of the rights or functions of the national judges, for instance, in limiting the exercise of their vote or disregarding it altogether in certain contingencies.[2] Such a solution would have the result of sanctioning formally the position of national judges as advocates of their national interests, and would tend to aggravate the evil. The same objection attaches to any proposal to abolish the right of national judges to deliver dissenting opinions. In addition, the dissenting opinions may have the advantage of checking manifestly partisan dissent by at least compelling the national judge to produce the reasons of dissent and by exposing the dissenter to the criticism consequent upon the weakness or frivolity of any such dissent—although experience teaches that that contingency has not prevented dissenting opinions and that any criticism of the legal merits of dissent must be confined to a small number of experts. However, for the time being and in default of a more radical remedy, there devolves upon international lawyers a distinct duty to examine the dissenting opinions, with due respect and without any implication of motives, but with a determination to call attention, if and when occasion arises, to any improper use of this right. But the major duty, upon which it is not necessary here to expatiate, rests with the national judges themselves. Perhaps the fulfilment of that duty would be made easier by the realization both of the insignificance of the advantage which the dissent confers upon the national judge's own state, and of the immeasurable value of the benefit which would be conferred upon the institution of international justice as a whole by an attitude of studied restraint and painstaking disinterestedness.

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[1] Thus, for instance, Article 16 of the revised Statute provides that the members of the Court may not exercise any political or administrative function, nor engage in any other occupation of a professional nature. This latter provision does not appear in the unrevised Article 16. The revised Article 17 provides that no member of the Court may act as agent, counsel, or advocate in any case. The unrevised Article 17 limited this prohibition to cases of an international nature.

[2] See, for instance, the suggestion of Sir John Fischer Williams in connexion with the casting vote of the President in *The Case of the Lotus, Chapters on Current International Law and the League of Nations* (1929), p. 229.

H. Lauterpacht.

THE ADMISSIBILITY IN EVIDENCE OF *TRAVAUX PRÉPARATOIRES*

One of the points on which most difficulty has been felt in relation to the acceptance by this country of any general submission to international arbitration is the difference between Anglo-Saxon rules of evidence and what seems to us the laxer practice of our Continental brethren. This difference is perhaps of less practical importance than might have been supposed, inasmuch as it is only rarely that disputed questions of contemporary fact have to be decided by an international tribunal. But in relation to the interpretation of documents, that most common topic of international litigation, questions may and frequently do arise as to the admissibility of the "preparatory work", *travaux préparatoires*, of commissions or committees which have been engaged in discussions preliminary to the conclusion of a treaty. Such discussions are obviously on a very different footing according as they represent exchanges of views between *all* the contracting parties or are merely preliminary debates between those contracting parties who have a common interest with a view to determine their course of conduct in relation to another party with interests of his own.

The Permanent Court has already on more than one occasion (see, e.g. *The Mosul Case*, Advisory Opinion No. 12, p. 22, and the *Danube Commission Case*, Advisory Opinion No. 14, pp. 28 and 31) intimated that it will not look at any *travaux préparatoires* when the text of the instrument itself is reasonably clear. But in the recent case of *The Territorial Jurisdiction of the International Commission of the River Oder*, heard in August and September 1929 (*Publications of the Permanent Court of International Justice*, Series A, No. 23,[1] Judgment No. 16), the issue of admissibility of certain *travaux* was raised directly and made the occasion of a separate interlocutory judgment of the Court. The litigation was between six Governments—Denmark, Germany, and Sweden together with France, Great Britain, and Czechoslovakia—on the one hand and the Polish Government on the other.

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[1] May the writer of this note be allowed to raise the question whether this system of *double numbering* of the judgments of the Court is not needlessly confusing? The important number for the lawyer is the number of the *judgment*: but the publications of the Court as issued give prominence to the (slightly higher) serial number in Series A.

The Polish Government in its Case sought to rely on certain passages in the Minutes of the Commission of the Paris Conference in 1919 which drafted the Treaty of Versailles—a Commission on which three of the six opposing Governments, namely Denmark, Germany, and Sweden, were not represented. The six Governments in their Counter-Case objected to the admissibility of this evidence. This objection was submitted separately to the Court on August 20, 1929, and was upheld, the Court including in its *considérants* the observations that

> "three of the Parties concerned in the present case did not take part in the work of the Conference which prepared the Treaty of Versailles; accordingly, the record of this work cannot be used to determine, in so far as they are concerned, the import of the Treaty; this consideration applies with equal force in regard to the passages previously published from this record and to the passages which have been reproduced for the first time in the written documents relating to the present case; and in any particular case, no account can be taken of evidence which is not admissible in respect of certain of the Parties to that Case."

We have thus a definite authority of the Permanent Court to the effect that *travaux préparatoires* cannot be used against a party who took no part in their preparation. The order, be it noted, appears to have been unanimous. Certain dissents from the main judgment do not apply to this order.

The authority is all the more important, in that the Court admitted without contest an argument drawn from the reply of the Allied and Associated Powers to the Austrian Delegation which negotiated the Treaty of St. Germain—a treaty which was not itself the subject of this litigation at The Hague but contained certain clauses, similar to that under discussion, for the internationalization, not of the Oder, but of other European rivers. Presumably the argument (whose admissibility, as already noted, was not challenged) was admitted as supplying the Court with what was alleged to be the interpretation already placed by international consent on similar language; in fact it was analogous rather to the citation of an "authority", in the Anglo-Saxon sense, than to the introduction of direct evidence as to the meaning attached by the Parties to the instrument in dispute.

The case of the Oder may serve to reassure the timidity of some English lawyers. While in a case where the text itself is not clear, help may be sought from preliminary interchanges of views between the parties, the Court will not travel wider and look at documents to which the parties themselves are strangers. And where the text is clear you cannot refer to preliminary correspondence to throw doubt upon the meaning of the written word. That these principles should have been accepted by a Court, the great majority of whose members have not been trained in the principles of a law of evidence, is a legitimate subject of congratulation to English lawyers.

J. F. W.

THE TACNA-ARICA QUESTION

To understand the Tacna-Arica question it is necessary to go back to a time when Chile and Peru were not, as they now are, contiguous, but when a large slice of Bolivian territory lay between them, comprising what is now the Chilean Province of Antofagasta. To the north of this lay the Peruvian Provinces of Tarapaca, Arica, and Tacna, each as it were superimposed upon the other northwards along the narrow strip of territory between the Cordilleras of the Andes and the Pacific Ocean. Still farther north lay what may be called Peru proper. At this time (prior to 1842) neither Chile nor Peru took any interest in the piece of Bolivian territory between them, consisting mostly of desert and pampa, and of no apparent value. About 1842, however, the discovery was made that guano existed in the desert of Atacama, this desert being mostly within Bolivian territory. Chilean interest became active; the President in a message to the Chilean Congress on July 31, 1842, announced that he had sent a Commission of exploration "for the purpose of discovering if any guano deposits existed in the territory of the Republic which might furnish a new source of revenue to the Treasury". Actually, however, these explorations took place mostly outside the territory of the Republic and within the territory of Bolivia, and their outcome was a Chilean law of October 31, 1842, providing that "all the guano deposits which exist in the Province of Coquimbo [Chilean territory], in the littoral of Atacama [mostly Bolivian territory] and in the adjacent islands, are hereby declared national property". This assumption of Chilean sovereignty over Bolivian territory, against which Bolivia duly protested, constitutes the real beginning of the controversy which culminated in the War of the Pacific of 1879 between Chile, Bolivia, and Peru, and which led to the prolonged dispute about Tacna and Arica.

The Chilean proclamation of sovereignty over Atacama was followed by various acts of aggression, including the landing of a Chilean military expedition at Mejillones, one of the principal ports of the Atacama district, and the ousting of the Bolivian authorities. Bolivia protested, but, being at that time weak and misgoverned, she was not able to do more than arrive at a compromise with Chile, by which a sort of condominium over the Atacama desert was set up, the real and effective sovereignty being vested in Chile. This condominium proving unsatisfactory, a new treaty was concluded some time later (1874) by which the boundary between Chile and Bolivia was pushed still farther northward.

These encroachments on Bolivian territory were naturally disquieting to Peru, who in 1873 accordingly entered into a defensive alliance with Bolivia. The treaty embodying the alliance was kept secret, but Chile nevertheless gained knowledge of it and relations between the two countries became somewhat strained.

At this stage matters were aggravated by the introduction of a new factor, namely the discovery (actually made some time previously) of nitrate in the northern part of the Bolivian Pacific territory and in the Peruvian province of Tarapaca. These nitrate fields were at the time undeveloped but have since become among the richest in the world. Many claims were staked out on the nitrate fields by the Chileans, and numerous Chileans were employed in the works, and in consequence perturbation was felt in Chile at an announcement which was made by the Peruvian Government that the nitrate industry in Peruvian territory was to be nationalized. Chile seems to have regarded this policy as directed solely against Chileans, although it appears that Chilean interests were in fact considerably less in Tarapaca than those of Peruvians and persons of other nationalities.

There now occurred one of those incidents, trivial in themselves, but which in an atmosphere of mistrust may lead to serious consequences. Two Chilean citizens had obtained from the Bolivian President Melgarejo a nitrate and railway concession in the Bolivian nitrate zone. Later the Bolivian Government tried to annul all the concessions granted by Melgarejo, who had fallen from power, but this particular concession, which had been assigned to an important nitrate company, was confirmed, though only on condition that the company should pay a much larger tax on its business than had been arranged under the original concession. Chile protested against this increase on the ground that a treaty of 1874 between Bolivia and Chile had provided against any future taxes on Chileans higher than those then in force. There seems to be little doubt that the Chilean contention was well founded. The company refused to pay the tax, and Bolivia thereupon first attached the property and subsequently decided to cancel the concession altogether. Chile asked for a suspension of these measures pending arbitration, delivering an ultimatum requiring compliance within forty-eight hours. Bolivia delayed her answer until the expiration of this period, when the Chilean Minister asked for his passports. Meanwhile, and prior to the Bolivian action in cancelling the concession, Chile had taken the offensive by sending into the harbour of Antofagasta the Chilean cruiser *Blanco Encalada.* No sooner had the decree rescinding the concession been announced in Chile, and before the delivery of the ultimatum to Bolivia, than Chile occupied the whole of the Bolivian littoral, to which she now made a claim of right, a claim which had no legal foundation whatever. Until Chile carried out these aggressive acts, considerable sympathy had been felt for her in Peru over the matter of the concession. Peru had instructed her Minister in Bolivia to use his good offices with a view to promoting a settlement and had also sent to Chile a mission, headed by Señor de Lavalle, who proposed that Chile should evacuate the occupied littoral and submit to arbitration the question of the Bolivian tax law and the cancellation of the concession. Chile refused to consider these proposals and some acrimonious interchanges followed, which culminated in Chile denying the disinterestedness of Peru, charging her with seeking to injure Chilean interests by her measures of nationalization of the nitrate industry, and with keeping secret the treaty of alliance between Peru and Bolivia. It is unnecessary to go into the details of the subsequent negotiations; they ended by Chile declaring war on Peru on April 5th, 1879. Bolivia joined Peru and there ensued the War of the Pacific.

The war resulted in an easy victory for Chile and the occupation of Lima and practically all Peru by the Chilean armies and naval forces. Chile was now in a position to dictate terms, and but for the friendly intervention of the United States there is little doubt that those terms would have been extremely severe. Even so, the terms as finally arranged included the unconditional surrender to Chile of the whole Bolivian littoral and of the Peruvian province of Tarapaca. In this way Chile gained possession of the whole of the nitrate fields, from all effective participation in which both Bolivia and Peru have since been debarred. A further result was that Bolivia was now deprived of any access to the sea, and became wholly an inland state, while Chile and Peru became contiguous.

North of Tarapaca lay the Peruvian provinces of Tacna and Arica which, it may be mentioned, produced very little, if any, nitrate, and still remain largely undeveloped. The settlement made concerning these provinces at the conclusion of the war is embodied in Article 3 of the Treaty of Peace between Chile and Peru, made at Ancon on October 20, 1883, and reads as follows:

> "The territory of the provinces of Tacna and Arica, bounded on the North by the River Sama, from its source in the Cordilleras bordering Bolivia to its *disemboguement* into the sea; on the South, by the ravine and river of Camarones; on the East, by the Republic of Bolivia; and on the West, by the Pacific Ocean, shall continue in the possession of Chile, subject to Chilean legislation and authority for a period of ten years

from the date of the ratification of the present treaty of peace. At the expiration of that term, a plebiscite will decide, by popular vote, whether the territory of the provinces above-mentioned is to remain definitely under the dominion and sovereignty of Chile or is to continue to constitute a part of Peru. That country of the two to which the provinces of Tacna and Arica thus remain annexed shall pay to the other ten millions of pesos of Chilean silver or of Peruvian soles of equal weight and fineness.

"A special protocol,[1] which shall be considered an integral part of the present treaty, will determine the form in which the plebiscite is to be carried out and the terms and time for the payment of the ten millions by the nation which remains the owner of the provinces of Tacna and Arica."

The treaty was ratified on March 28, 1884, so that, under the terms of the above article, the plebiscite should have been held on or after March 28, 1894. In fact it was not held on that date, nor has a plebiscite ever been held. When the ten years were up, Peru at once asked for the plebiscite to be held. Chile, without actually resisting the request, remained passive, and, when pressed actually to settle the terms under which the plebiscite should be held, was inclined to put forward conditions which made it very doubtful whether the result would fairly voice the opinion of the inhabitants of the district. It was obviously in the interests of Chile to put off the holding of the plebiscite as long as possible so that the inhabitants of Tacna and Arica would become reconciled to her rule and would not wish to revert to Peru, and it was also clearly in her interest to proceed with what has been termed a "progressive Chileanization" of the population so long as she did not thereby alienate their sympathies. There can be little doubt that, without actually refusing to hold the plebiscite or taking steps which would have made the holding of one futile, Chile carried out the above policy in both respects. The truth is that there was a fundamental disagreement between the two countries as to the true interpretation of Article 3 of the Treaty of 1883. Chile maintained that the intention at the time, known to both parties, was that Tacna and Arica should pass wholly and definitely to Chile and should be incorporated in her territories, and that the provision respecting the plebiscite was merely intended to calm Peruvian public opinion at the time and was certainly not intended to be carried out. Alternatively, it was maintained by Chile that the holding of a plebiscite, together with a vote in favour of Chile, was not intended as a condition precedent of depriving Peru of sovereignty over the territories and passing it to Chile, but on the contrary that the sovereignty over the territories passed to Chile by the treaty and that the holding of a plebiscite, together with a vote in favour of Peru, was a condition subsequent to divesting Chile of sovereignty and returning the territories to Peru. In view of the express wording of the treaty, the Chilean contentions appear to be ill-founded. It is impossible, in the face of Article 3, to suppose that the plebiscite was never really intended to be held, and further it seems clear that the legal sovereignty in the territory remained with Peru. The territories were expressed to continue in the *possession* of Chile, subject to Chilean legislation and authority, for a period of ten years, and at the expiration of that time a plebiscite was to decide "whether the territory of the provinces is to remain definitely under the dominion and sovereignty of Chile or is *to continue to constitute a part of Peru*".

It would be wearisome to go into the history of the protracted negotiations which took place concerning the holding of the plebiscite. Diplomatic relations were more than once broken off on both sides, but no definite arrangement was arrived at until 1922, when the whole matter was submitted to the arbitration of the United States.

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[1] This protocol was never made.

The first question which the arbitrator had to decide was whether in the circumstances as they then stood, the plebiscite should be held or not. In order to determine this question, he had first to decide whether, by reason of the long lapse of time, the provision should be considered as no longer operative. He decided that the lapse of time made no difference, that the Treaty of 1883 did not contemplate the holding of a plebiscite at any fixed time, but at any time after ten years from the ratification of the treaty. Secondly, the arbitrator had to decide whether either party, by preventing the holding of the plebiscite or by embarking on a course of action which was calculated to make the holding of one fruitless, in the sense that no true expression of opinion could be obtained from the population of the districts, had entitled the other party to regard itself as discharged from its obligations under the Treaty of 1883. The consideration of this question resolved itself in effect into two parts; first of all, whether Chile, by maintaining a passive attitude towards the demands of Peru for a plebiscite and by putting forward conditions as to the holding of a plebiscite which Peru could not accept, had in effect refused to hold a plebiscite at all, and secondly whether the course of administration pursued by Chile in Tacna and Arica had been of such a character as to make the holding of the plebiscite worthless. As to the first question, the arbitrator decided that since the Treaty of 1883 merely provided that the plebiscite should be held, without specifying the conditions under which it should be held, there was a necessary implication that the parties should be entitled to negotiate and to arrive at an understanding on the subject, and he found as a fact that the actions of Chile between 1898 and 1922 did not amount to a definite refusal to hold the plebiscite and were justifiable as part of the ordinary process of negotiation. On the second question the arbitrator had to consider the allegations made by Peru as regards the policy of "Chileanization" alleged to have been carried out by Chile in Tacna and Arica. These accusations fell under two main heads: (*a*) the subsidized introduction of Chilean citizens, and (*b*) the gradual dispersal of the Peruvian population after 1900.

As regards (*a*), the acts charged as constituting a subsidized introduction of Chilean citizens were as follows: the creation of a Department of Tarata, the removal of the court of appeals from Iquique to Tacna, the removal of military head-quarters from Iquique to Tacna and the concentration of Chilean military forces in the provinces, the founding of newspapers for pro-Chilean propaganda, the subsidizing of factories, the granting of railway, irrigation and other concessions, colonization, and the arrangements in regard to the Arica customs. On all these questions the arbitrator found that the Treaty of 1883 placed the provinces of Tacna and Arica under Chilean law and authority during a period of ten years, that such period was impliedly extended by the treaty until such time as a plebiscite should in fact be held, and that all the actions complained of were properly within the power of Chile to perform under the terms of the treaty.

As regards (*b*), namely the gradual dispersal of the Peruvian population after 1900, the acts complained of were: the closing of the Peruvian schools, the expulsion of Peruvian priests, the suppression of Peruvian newspapers, depriving Peruvians of the right to assemble and display the Peruvian flag, the boycott of Peruvian labour, the conscription of Peruvian youth into the Chilean army, the expulsion of Peruvian citizens and the general persecution of the Peruvian people through mob violence either tolerated or encouraged by the authorities, and miscellaneous official persecution of all kinds. With regard to most of these heads, the arbitrator found that the Peruvian allegations were not well founded, or alternatively that although there might in some cases have been cause for complaint, the acts complained of were not nearly so many or so frequent as alleged by Peru, and were certainly not such as to amount to a frustration by Chile of the purpose for which the plebiscite was to be held. Nevertheless, it is clear from the findings of the arbitrator that the Peruvian complaint taken as a whole was far from being altogether unfounded, and that there was reason to suppose that in the circumstances then obtaining in Tacna and Arica it would be difficult, if not impossible, ever to hold a plebiscite which should fairly represent the views of the population. This view is confirmed by subsequent events.

Having found that there was no reason why a plebiscite should not be held, the arbitrator went on to order one and to prescribe in detail the conditions under which it should be carried out. These related first of all to the persons who should be allowed to vote, and secondly to the setting up of a plebiscitary commission which should supervise the actual holding of the plebiscite and the recording and counting of the votes. In view of the fact that no plebiscite was ever held either in accordance with these provisions or at all, it is unnecessary to go into the details of the conditions laid down, except to say that they seem scrupulously fair and such as would, if carried out, have been most likely to lead to a true expression of opinion on the part of the inhabitants of the provinces.

The plebiscitary commission assembled in Arica in or about August 1925 under the presidency of General Pershing, who had been selected by the United States, and pursued an unharmonious course until January 1926, when General Pershing left and was replaced by General Lassiter. He was unable to bring matters to a conclusion and was in the end compelled to issue a reasoned statement showing that the attitude of the Chilean administration in the provinces made the holding of a fair plebiscite an impossibility. When this deadlock was reached, the United States proffered its good offices in order to achieve a settlement. Both Governments at first concurred, but later Chile withdrew. A renewal of the offer in November 1926 was accepted by Chile but rejected by Peru, and the matter remained in suspense until the end of 1927. In 1928, at the Pan-American Conference at Havana, the Chilean and Peruvian delegations happened to find themselves in close contact and, owing to the wisdom of their respective leaders, established friendly and almost cordial relations which ultimately led to a resumption of negotiations concerning Tacna and Arica, in which both countries received the assistance of the United States, and finally to a definitive agreement which was concluded on June 3, 1929.

The main provisions of the settlement are as follows: By Article 1 the dispute arising out of Article 3 of the Treaty of 1883 is declared to be definitely at an end. By Article 2 the territory of Tacna and Arica is divided into two parts, Peru taking Tacna, and Chile taking Arica. There follow provisions as to boundaries and the tracing of the frontier by a special mixed commission. By Article 5 Chile undertakes to construct for Peru free of charge within the Bay of Arica a mole and breakwater for steamers, a customs house and a terminal station for the railway to Tacna, together with necessary buildings, and to allot an area in which merchandise in transit to or from Peru should enjoy treatment not less favourable than that accorded in a free port. By Article 6 Chile undertakes to pay to Peru the sum of six million dollars and to hand over all property, whether built or in course of construction, belonging to the state but situated in the territory awarded to Peru. The remaining articles contain provisions for the adjustment of questions arising out of the main settlement, including a right given to children of Peruvian nationals born in Arica and children of Chilean nationals born in Tacna to opt for either nationality on reaching the age of twenty-one, but until that age to be deemed to be of Peruvian and Chilean nationality respectively. There is also an arbitration clause providing for arbitration by the President of the United States in the event of any dispute arising between the two countries as to the interpretation of the treaty and of no friendly agreement being reached between them. In accordance with these provisions Tacna was formally returned to Peru on August 28, 1929.

This long-standing dispute, therefore, ends, as in so many cases, in a compromise. It is, however, noticeable that, whereas Chile pays to Peru the sum of six million dollars in respect of the acquisition of Arica, Peru pays nothing to Chile in respect of the retention of Tacna. This would seem to imply an admission on the part of Chile that both provinces were, up till the date of settlement, under the legal sovereignty of Peru, although in the possession and under the *de facto* rule of Chile. It may be mentioned in conclusion that for some time before the settlement was arrived at, there was talk in certain quarters of ending the dispute by making the provinces of Tacna and Arica into a Bolivian corridor to the sea. It was recognized by Bolivia that her former littoral territory of Antofogasta could not now be restored to her by Chile, as this would involve introducing foreign territory between Chile proper and the Chilean province of Tarapaca which Chile had annexed from Peru after the War of the Pacific, but Bolivia for a time entertained hopes that the disputed provinces of Tacna and Arica, neither of which was of great value in itself to the two countries concerned except for sentimental reasons, but which would afford to Bolivia the necessary direct outlet to the sea for her goods and mineral products, might be transferred to her, thus at the same time settling a long-standing quarrel between the two larger states. These hopes have been disappointed, and there seems little chance now of either Chile or Peru consenting to any transfer of territory to Bolivia. In this connexion it should be mentioned that, concurrently with the settlement of the main question, Chile and Peru entered into a separate protocol by which both countries agree not to cede to any third Power without each other's consent any part of the territories which, in accordance with the main settlement, come under their respective sovereignties, nor without such agreement to construct any new international railway lines through these territories. It is understood that Bolivia does not acquiesce in her permanent exclusion from access to the sea.

G.

THE SUBLIMATION OF THE MANDATE FOR IRAQ

THE Mandate for Iraq has run a rapid and episodic course. After it had been awarded to Great Britain by the Principal Allied Powers at the Conference of San Remo in April 1920, the draft of the instrument defining the powers and obligations of the Mandatory was laid, with that of the other "A" mandates, before the Council of the League of Nations in September 1921. It provided for the Mandatory drawing up, in consultation with representatives of the people, an Organic Law which should contain provisions designed to facilitate the development of the country as an independent state. But the word "mandate" and the system of mandate were bitterly resented in Iraq, partly because they were not understood but were interpreted to involve the imposition of an order by a superior on his subject, instead of the ideas of delegated authority and a trust. Great Britain encouraged the people of Iraq to elect themselves a King in 1921, so as to mark the recognition of the growing independence of the state; and in 1922, when the other "A" mandates were confirmed by the Council of the League, she announced a change of plan with regard to Iraq. Her relations with the infant state and her obligations to the Members of the League as regards that state were to be expressed primarily in a Treaty of Alliance between the King of Iraq and His Majesty's Government, in which the obligations of the Mandatory were in great measure devolved on the King, subject to the duty of following the advice and receiving the aid of the guardian Power.

The Council of the League was complacent, and accepted the change of method. The British representative at the Council in May 1923 made a declaration that His Majesty's Government would be responsible to the League of Nations for the execution of the treaty, and for submitting an Annual Report on the territory to the Mandates Commission. The declaration and a statement of the reduced direct obligations of the Mandatory were embodied in an 'Act', as it was called in order to avoid the unblessed word for the territory which had shed the blessed name of Mesopotamia. That Act was approved by the Council of the League in October 1924, a few months after the Constituent Assembly of Iraq had, with great difficulty, been brought to ratify the treaty with Great Britain and the Organic Law that had been prepared. The mandate, as it was said by the Vice-President of the Mandates Commission, *se volatilisa.*

Though the word and the form had been changed, there was still continual resentment in Iraq at the maintenance of the relation of guardianship; and Great Britain engaged to take steps to bring it to an end four years after the coming into force of the treaty with Turkey, by moving then for the admission of her ward into the League. In 1925, however, the League had to deal with the question of the frontier between Iraq and Turkey in connexion with the Province of Mosul, and it was made a condition of the award in favour of the Arab state, that the treaty between Great Britain and Iraq should be maintained for a period of not less than twenty-five years. Each year, however, has seen a demand for fuller freedom by the adolescent people. In 1927, a fresh treaty was drafted, by which Great Britain undertook again to press for the admission of Iraq to the League in 1932 if the progress of the country was maintained. In 1928 the military agreement between the two countries, which was attached to the original treaty, was modified. And last year two applications to the Council of the League were made by Great Britain with a view to hastening the process of emancipation of Iraq. The earlier concerned the judicial system, which, in accordance with the original agreement attached to the treaty and approved by the Council, provided for the presence of English judges in the court in cases in which a subject of a foreign state which had had capitulations with Turkey was a party. Persia, which had the largest number of foreign subjects in Iraq, objected to the discrimination between capitulatory and non-capitulatory states; and Great Britain proposed to the League that there should be a simple judicial system for Iraq in which the guarantee for the respect of foreigners' rights would be obtained by the general supervision of British judges. Then, at the end of the year, the

British representative at the Council put forward definite proposals to terminate the tutelage altogether in 1932 and to apply to the League of Nations for the admission of Iraq.

The continuance of any control by the guardian was regarded by the people of Iraq as a "perplexing predicament", the term they applied to a system which invested them with national independence but at the same time required them to take advice. The Oriental people claimed that it should reach its majority at an early age, and should definitely pass beyond the stage of semi-emancipation. Great Britain has accepted that demand, and proposes to define her relations in a fresh treaty, similar to that which she is negotiating with Egypt, if and when Iraq is admitted to the League. The observance of the rules of International Law and of the special obligations specified in the treaties will then be the undivided responsibility of the new Member of the Society of Nations.

N. B.

DIVERSION OF INTERNATIONAL WATERS

A SUIT now pending in the United States Supreme Court between the states of Connecticut and Massachusetts involves important questions of International Law similar to those presented by the diversion of water from Lake Michigan at Chicago. The Connecticut River flows through the states of Vermont, Massachusetts, and Connecticut, becoming navigable in its lower reaches. On her own territory Massachusetts proposes to divert in part two small tributaries in order to build a new reservoir for the water-supply of Boston. She maintains that this diversion is in fact necessary to meet the needs of a rapidly growing population, that it constitutes a reasonable riparian use, that it neither causes nor threatens any immediate injury to Connecticut, and that the amount involved is insignificant in relation to the total volume of the river. The Federal Government has intimated that it will raise no objection from the point of view of navigation interests. Connecticut takes her stand upon the strict common law doctrine of riparian rights, arguing that proof of damage is unnecessary, her right to the normal flow of the streams being absolute in its nature. She further denies that the doctrine of necessity can justify an invasion of the property interests of another state.

These cases involving the economic use of international rivers are rapidly increasing in number and importance, and in future they seem likely to arouse more discussion than the questions of navigation rights which have hitherto furnished the main juristic interest of these waterways. The general principle of free navigation has now been so widely established that little remains to be done except to adjust its application to particular cases. But the group of problems connected with diversion is now introducing us to a chapter of International Law which is still in the making.

At first sight, the most obvious solution may appear to lie in applying the private law rules which govern the mutual rights of riparian owners, but closer examination shows that these easy analogies are apt to be misleading. In all modern systems of law it has been found necessary for the state to assume the power of over-riding the individual rights of riparian owners in the interest of the community as a whole. Without the exercise of this paramount authority we should never have been able to meet such essential modern needs as communal systems of water-supply, drainage, and hydro-electric power. Until the state intervenes, private law in effect gives to every riparian owner a right of veto upon the activities of his neighbour, however beneficial they may be. The state, on the other hand, is in a position to treat every river system as a natural unit and to administer it as such for the benefit of the whole community. Analogies based upon private law rules are, therefore, misleading until we are able to find some means for determining what the United States Supreme Court has called "the equitable division of benefits" in international waters. The principle is clear, but at the present stage of international society it is not easy to devise an appropriate machinery for its application. The function of International Law must be to discover some means of doing what the state does in modern municipal law. That is to say, every river system must be so developed as to render the greatest possible service to the whole community through which it flows, even though that community may be divided by political frontiers. Practice has already moved far in this direction, and doctrine must show itself ready to follow the same road.

H. A. S.

PAYMENT FOR STATE PROPERTIES ON CESSION OF TERRITORY

The question of "reparations" is now assumed to be completely and finally settled; the new arrangements centring round the acceptance of the Young Plan have definitely put an end to the obligation, particularly important in the case of the "succession states" of Austria-Hungary, to pay the value of state properties situate on ceded territories. The question being thus removed from practical politics, the international lawyer may be allowed in his study to give utterance to the following reflections:

Payment for state properties upon a cession of territory cannot be said to be an established principle of International Law. It was introduced for special reasons into the treaties which terminated the war, but the precedents of cessions in modern times, which are given with some fullness by Bonfils-Fauchille,[1] prove clearly that this was in the nature of an innovation.[2] Bluntschli[3] indeed says in effect that a payment by the cessionary state is only due if the property served the needs of populations which are not annexed and whose Governments are involved in fresh expense by reason of the annexation. Oppenheim, Hall, and Westlake would appear not to recognize any right to a payment. Perhaps the one instance in which such a right might be recognized would be the case, rare under modern conditions, in which a monarch acquires a palace or other property which may be regarded as having been private or personal to the monarch of the state dispossessed.

Without going into the matter at any length it will be enough to suggest three arguments which seem to go near to demonstrating the impossibility of accepting the principle of payment as generally valid in international law:

(1) The amount to be paid by the acquiring state on a cession of territory will depend not on the economic value of the acquisition as a whole, but on the accident whether the territory acquired was governed on individualist or collecti-

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[1] *Droit International Public* (8th ed.), Vol. I, § 219.

[2] In 1825 Haiti agreed to pay France 30,000,000 francs "for the public buildings and fortifications most of which were now in ruins". *Survey of American Foreign Relations*, 1929 (Yale University Press), p. 116.

[3] *Droit International Codifié* (French translation), 2nd ed., § 56.

vist principles. The annexation of a part of a wholly socialist state might spell bankruptcy.

(2) If the whole of a state is annexed, nothing is payable as there is no *persona* of international law left to receive payment.

(3) The principle of payment neglects the fact that the acquiring state consists, after the acquisition, of the original state plus a new population, while the dispossessed state is minus a part of its former inhabitants. The new population of the acquiring state will be asked to bear by taxation part of the burden of paying for property which it enjoyed already, and the diminished population of the old state receives payment in full for property in which, before the cession, it possessed only a fractional interest. J. F. W.

GENERAL CONVENTIONS PREPARED AT GENEVA IN 1929

LEAGUE OF NATIONS

I

PROTOCOL RELATING TO THE ACCESSION OF THE UNITED STATES OF AMERICA TO THE PROTOCOL OF SIGNATURE OF THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE.[1]

THIS Protocol is a short document consisting of eight articles. Under the first, the signatories accept the special conditions attached by the United States in the five reservations to its adherence to the Protocol of Signature of the Statute of the Permanent Court of International Justice. By Article 2, the United States are admitted to participate on terms of equality with the signatory states Members of the League of Nations in all proceedings of either the Council or the Assembly for the election of judges for the Court. By Article 4, it is provided that the Court shall render advisory opinions in public session (compare below the amendments to the Statute of the Court). By Article 5, there are various provisions for ensuring that the Court shall not "without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest". It is laid down that in such a case an exchange of views as to whether the interest of the United States is affected shall proceed with all convenient speed between the Council or Assembly of the League and the United States. Pending the result of such consultation, proceedings in the Court are to be stayed. There follows a vitally important provision that "there shall be attributed to an objection of the United States the same force and effect as attaches to a vote against asking for the opinion given by a Member of the League of Nations in the Council or in the Assembly". It will be noted that this leaves open the question whether advisory opinions can be asked for by majority. It is further laid down, however, that if the United States is not content with the decision arrived at by the Council or the Assembly, it may withdraw its adherence to the Protocol of Signature "without any imputation of unfriendliness". The intimation of such withdrawal can come into effect at once. The other signatories of this Protocol may bring it to an end if two-thirds of them, other than the United States, notify the Secretary General that they desire to withdraw their acceptance.

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[1] The text of this Protocol is to be found in League of Nations document C. 493, M. 157. 1929. V.

This Protocol was signed by the representatives of fifty countries.

II

PROTOCOL CONCERNING THE REVISION OF THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE.[1]

THE amendments to the Statute of the Permanent Court of International Justice adopted by the last Assembly of the League of Nations are contained in the Annex to this Protocol. They provide a new text for Articles 3, 4, 8, 15, 16, 17, 23, 25, 26, 27, 29, 31, 32, and 35, and they add four new Articles 65–8.

The changes introduced relate to:

1. The abolition of deputy judges.
2. The right of states not Members of the League who are signatories of the Statute of the Court to take part in the election of judges.
3. The special chambers for labour, transit, and summary procedure.
4. Emoluments given to the members of the Court.
5. Advisory opinions.

There are also one or two small amendments of translation to bring the French and English texts into accord.

With regard to deputy judges, it is provided that the Court shall consist of fifteen members and the post of deputy judge is done away with. It is provided that no member of the Court may exercise any political or administrative function or engage in any other occupation of a professional nature, nor participate as agent, counsel, or advocate in any case, or as a member of a national or international court. It was previously open to deputy judges, when not actually serving, to fulfil such functions. It is further provided that the Court is to remain permanently in session except during the judicial vacations, the dates and duration of which shall be fixed by the Court.

With regard to the special chambers, the changes introduced relate to national judges, and, apart from improved drafting, are of small substantive importance.

The new Article 32 provides that the members of the Court shall receive an annual salary instead of the existing system by which they receive an "annual indemnity" and an indemnity for each day on which the Court sits.

The new Chapter 4 on advisory opinions is added to the Statute. This is put in to meet the views of the United States as laid down in their reservations to their acceptance of the Statute.

By the new Article 65, it is provided that the President of the Assembly or of the Council or the Secretary General acting by instructions of the President of one of these bodies must ask for an opinion by means of a written request containing "an exact statement" of the question upon which an opinion is required.

By Article 66, the Registrar has to notify any Member of the League or states admitted to appear before the Court, *or any international organization* considered by the Court as likely to be able to furnish information, that the Court will be prepared to receive statements which they may care to make.

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[1] The text of this Protocol is to be found in League of Nations document C. 492, M. 156. 1929. V.

Article 67 provides that advisory opinions shall be delivered in open court, and by Article 68 the Court is to be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

The Protocol was signed by thirty-nine Members of the League.

III

INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF COUNTERFEITING CURRENCY.[1]

THIS Convention was drawn up by an International Conference held in Geneva in the Spring of 1929, and bears the date May 1, 1929. It is accompanied by a Protocol, a Final Act of the Conference and an Optional Protocol.

The articles of the Convention may be divided into three categories:

i. Consists of definitions of the crimes of fraudulent making or altering of currency, &c., which under the Convention the Contracting Parties undertake to suppress and punish; together with rules which the High Contracting Parties undertake to observe.

Among other principles embodied in these rules are the principles that:

(1) In the territory of a country whose internal legislation recognizes the principle of the prosecution of offences committed abroad, foreigners are to be punished in the same way as if the offence had been committed in that country.

(2) That the offences dealt with by the Convention shall be deemed to be included as extradition crimes in any extradition treaty which has been or may hereafter be concluded between any of the High Contracting Parties.

ii. Consists of clauses relating to the organization to be set up for the repression of the crimes of counterfeiting currency.

Article 12 of the Convention lays upon the Contracting Parties the duty to establish a central office which is to be in close contact with institutions issuing currency, with the police authorities in the country and with the "central offices" of other countries. The purpose of this central office is to centralize in each country all information likely to facilitate the investigation, prevention and punishment of counterfeiting currency.

Articles 13 and 14 lay down that the central offices are to communicate direct with each other, and that they will supply each other with information of all new currency issued and will forward specimens of cancelled currency, &c.

Article 15 provides that the representatives of these central offices shall from time to time hold international conferences with the participation of representatives of the banks of issue.

Article 17 lays down an important general principle in the following terms:

"The participation of a High Contracting Party in the present Convention shall not be interpreted as affecting that Party's attitude on the general question of criminal jurisdiction as a question of international law."

iii. The third category of articles contains the general provisions of the Convention. These include the reference of all disputes concerning the interpretation or application of the Convention to the Permanent Court; the power of states ratifying or acceding to the Convention to make reservations subject to the consent of the other parties; the entry into force of the Convention when five ratifications have been obtained. It is further laid down that ratification by any High Contracting Party "implies that its legislation and its administrative organization are in conformity with the rules contained in the Convention".

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[1] The text of this Convention is to be found in League of Nations Document C. 153, M. 59. 1929. II.

Certain other important "recommendations" are embodied in the Final Act, which also indicates in greater detail the nature of the work of the central offices.

The Final Act also suggests that the international conference, to be held in pursuance of Article 15 of the Convention, might usefully consider the making of another international convention for the suppression of counterfeiting other securities, such as share and debenture certificates, cheques, bills of exchange, &c.

The Convention was signed by the representatives of twenty-six countries. Of this number all except three were European and included the U.S.S.R.

IV

Agreement concerning the Preparation of a Transit Card for Emigrants.[1]

The purpose of this Convention is to simplify the transit formalities for emigrants crossing the territories of the signatory Powers.

It provides that a "Transit Card", of which a standard model is attached to the agreement, shall be provided by the Governments of countries in whose ports the shipping companies take emigrants on board. The transit cards are to be supplied at cost price and free of any tax or charge, with suitable notices printed in at least seven other languages besides that of the country of embarkation.

The emigrant must fulfil certain conditions before the transit card is granted to him, but if these conditions are fulfilled the contracting parties will then allow him to pass in transit through their respective territories without requiring his passport to have a consular visa and without any other special control or traffic charges. The shipping company which issues the transit card to an emigrant who subsequently remains in the territory of one of the contracting Governments without authorization is responsible to the said Government for the expenditure which the latter may thereby incur (Article 7). Any dispute concerning the interpretation or the application of the Agreement shall be submitted to a court of arbitration, the chairman of which shall, unless agreement is otherwise reached, be appointed by the Chairman of the Advisory and Technical Committee for Communications and Transit of the League of Nations. The court is given the power itself to settle the *compromis*.

The Agreement does not require ratification, but came automatically into force for the thirteen Governments who were its original signatories three months after the date of their signature, i.e. on September 12, 1929.

The last article provides that the Agreement is subject to revision at the request of not less than one-third of the contracting Governments "with a view to granting more extensive facilities to emigrants crossing their territory".

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[1] The text of this Agreement is to be found in League of Nations document C.L. 180. 1929. VIII.

INTERNATIONAL LABOUR ORGANIZATION

The International Labour Organization at its twelfth Session in May 1929 adopted four Recommendations and two Draft Conventions for ratification by Members of the International Labour Organization in accordance with the provisions of Part XIII of the Treaty of Versailles.

V

Draft Convention concerning the Marking of the Weight on Heavy Packages transported by Vessels.[1]

The substantive obligations of this Convention are all contained in Article 1, which provides that any package or object of one metric ton or more in weight, consigned for transport by sea or inland waterway, shall have had its gross weight plainly and durably marked on it before it is loaded on to a ship or vessel.

The obligation to see that this requirement is observed rests solely upon the Government of the country from which the package is consigned.

The remainder of the Convention consists of the clauses usually found in I.L.O. Draft Conventions providing for ratification, denunciation, and revision.

VI

Draft Convention concerning the Protection against Accidents of Workers employed in Loading or Unloading Ships.[2]

This Convention consists of elaborate rules for the protection against accidents of all classes of workers employed in the process of loading or unloading any ship, whether engaged in maritime or inland navigation.

It provides in particular that the approaches over quays to ships shall be efficiently lighted; that a passage shall be kept clear to means of access; that any space left along the edge of a wharf shall be at least three feet in width, &c. Similar provisions with regard to ladders and gangways to ships are laid down. With regard to means of access to the holds of ships, other articles relate to safety measures in connexion with hatchways, hatch coverings and beams, hoisting machines or gears, &c. It is provided that hoisting machines must be left in charge of competent persons and that they shall be subject to periodic inspection; that in all quays, docks, wharves, &c., first-aid outfits shall be kept and provision made for the rescue of immersed persons from drowning.

Exemptions may be granted by signatory Powers on certain conditions, but any such exemption must be notified to the I.L.O., and it is laid down that penalties for breaches of regulations shall be imposed.

"RESERVES" IN MULTILATERAL INTERNATIONAL AGREEMENTS

There are few subjects on which an authoritative pronouncement by the Permanent Court would be more welcome than on the question of the effect of the "reserve", often made at the eleventh hour, in an international multilateral agreement.[1] The following dialogue, taken with the suppression of names, from the minutes of one of the Commissions of a recent Conference (not, be it observed, from the minutes of the Plenary Conference itself) may give some indication of the conditions in which such "reserves" are made.

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[1] The text of this Convention can be found in the I.L.O. Official Bulletin, September 15, 1929. Supplement to Vol. XIV, No. 2.

[2] The text of this Convention can be found in the I.L.O. Official Bulletin, September 15, 1929. Supplement to Vol. XIV, No. 2.

> "*The Delegate of State 'A'*. If I rightly understand, Mr. Chairman, the agreement with state 'B' has just been adopted, I should like to say that state 'A' can accept this agreement but with the reserve of all claims of a certain class.
>
> *The Chairman*. Then, you approve the agreement.
>
> *The Delegate of State 'A'*. Yes, subject to the reserve which I have just made.
>
> *The Chairman*. But you sign the agreement.
>
> *The Delegate of State 'A'*. Yes, under that reserve.
>
> *The Chairman*. The reserve will be mentioned in the minutes.
>
> *The Delegate of State 'B'*. I have nothing to say; the declaration is unilateral.
>
> *The Chairman*. We are then in agreement."

Let us trust that these last words of the Chairman represent the truth, though we confess to some uncertainty whether the agreement reached is (*a*) that state A and all the other states are bound by the treaty subject only to the reserve, or (*b*) that the reserve not having been accepted by any other contracting party, state "A" is bound by the treaty which it signs, or (*c*) that there being no common consent to all the terms of the treaty, the agreement is that so far as state "A" is concerned there is no agreement.

O.

THE EDITORIAL COMMITTEE

There are some personal events, occurring during the past year, which deserve to be chronicled, as they affect members of the Editorial Committee of this *Year Book* and are gratifying to its readers. Sir Cecil Hurst has been elected a Judge of the Permanent Court of International Justice. The vital services which he has rendered to the *Year Book* since its foundation in 1920 have made this election particularly welcome to all those interested in its publication, either as contributors or as readers. Sir William Malkin has succeeded him as Legal Adviser to the Foreign Office. Professor Pearce Higgins has been elected President of the Institut de Droit International and has also been appointed by the British Government as a British member of the Permanent Court of Arbitration at The Hague. Professor Brierly and Sir John Fischer Williams were at the same meeting elected Associates of the Institut.

A. D. McN.

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[1] See articles by Mr. Malkin in the *Year Book* for 1926, page 141; and by Mr. Quincy Wright in *American Journal of International Law*, Vol. XXIII, p. 94.

DECISIONS, OPINIONS, AND AWARDS OF INTERNATIONAL TRIBUNALS, 1929.

JUDGMENTS AND ADVISORY OPINIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

JUDGMENT NO. 14. DELIVERED JULY 12, 1929.

The Serbian Loans Case.[1]

THIS case was submitted to the Court by a Special Agreement concluded at Paris on April 19, 1928, between France and the Kingdom of the Serbs, Croats and Slovenes, whereby the Court was asked to decide the following questions:

"(*a*) Whether, as held by the Government of the Kingdom of the Serbs, Croats, and Slovenes, the latter is entitled to effect in paper francs the service of its 4% 1895, 5% 1902, 4½% 1906, 4½% 1909, and 5% 1913 loans, as it has hitherto done;

(*b*) or whether, on the contrary, the Government of the Kingdom of the Serbs, Croats, and Slovenes, as held by the French bondholders, is under an obligation to pay in gold or in foreign currencies and at the places indicated hereinafter, the amount of the bonds drawn for redemption but not refunded and of those subsequently drawn, as also of coupons due for payment but not paid, and of those subsequently falling due for payment of the Serbian loans enumerated above, and in particular:

1. With regard to the Serbian 4% loan of 1895, whether holders of bonds of this loan are entitled, whatever their nationality may be, to obtain, at their free choice, payment of the nominal amount of their coupons due for payment but not paid and of those subsequently falling due for payment, as also of their bonds drawn for redemption but not refunded and of those subsequently drawn, at Paris, London, Berlin, Vienna, Geneva, and Belgrade, in the currency in circulation at one of these places:
2. With regard to the 5% 1902, 4½% 1906, 4½% 1909, and 5% 1913 loans and subsidiarily with regard to the above-mentioned 4% loan of 1895, whether holders of these bonds are entitled to obtain payment of the nominal amount of their coupons due for payment but not paid and of those subsequently falling due, as also of their bonds drawn for redemption but not refunded and of those subsequently drawn, in gold francs at Belgrade, Paris, Brussels, and Geneva, or at the equivalent value of the said amount at the exchange rate of the day in the local currency at Berlin, Vienna, and Amsterdam, in so far as concerns the 1902, 1906, and 1909 loans;
3. Lastly, how the value of the gold franc is to be determined as between the Parties for the above-mentioned payments."

It was common ground that the service of the various loans referred to had in the past been effected in respect of the French holders in French francs at their current value. The service of the loan was conducted in this manner, in particular, during the war period when it was met either by the French Government or out of funds advanced by the French and British Governments. From 1924 or 1925 onwards, however, the holders began to refuse to accept payment of their coupons on this basis, and to make protests, contending that the loan service should be on a gold basis. It was also common ground that the proceeds of the various loans was originally credited to the Serbian Government in French francs at the current value.

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[1] Series A, Nos. 20–21. The judgments and advisory opinions of the Court and the Acts and Documents relating thereto are issued by the Court in three series, namely *Judgments* (Series A), *Advisory Opinions* (Series B), and *Acts and Documents relating to Judgments and Advisory Opinions* (Series C). The publisher is A. W. Sijthoff's Publishing Co., Leyden. (English Agents: Butterworth & Co., Bell Yard, London, W.C. 2.)

The French bondholders ultimately requested their Government to intervene on their behalf; the French Government took up their case, and diplomatic negotiations followed which were unsuccessful, with the result that the dispute was submitted to the Court. Under the Special Agreement, however, the Court's judgment is not finally to settle the manner in which the service of the loans is to be effected, for Article II of that Agreement provides for negotiations to be initiated within one month from the delivery of the judgment for the purpose of arriving at an equitable arrangement, taking into account the interests of the bondholders in the event of the decision being in favour of the Serbian Government, and the economic and financial difficulties of that Government in the event of a decision in favour of the French claim.

The first point raised in the judgment of the Court relates to the form and nature of the dispute before it. It will be noticed that although the claim of the bondholders was adopted by their Government in the manner customary in international litigation, the Special Agreement is somewhat peculiar in that it appears to describe the controversy as one between the Serbian Government, on the one hand, and the bondholders, on the other.

The Court observes that under Article 34 of its Statute "only states or Members of the League of Nations can be parties in cases before the Court". It follows (says the judgment) that if the present dispute were to be regarded as one between the Serb-Croat-Slovene State and certain bondholders of the loans, one of the essential conditions of procedure before the Court, namely, the legal capacity of the Parties, would be unfulfilled. In all previous cases before the Court where private interests have been involved, the state's claim has been based upon an alleged breach of an international agreement. Here, on the contrary, the controversy is exclusively concerned with relations between the borrowing state and private persons, i.e. relations which are, in themselves, within the domain of municipal law.

But the question whether the Serbian Government is conducting the service of its loans in accordance with its obligations is no longer merely the subject of a controversy between that Government and its creditors. The French Government has intervened on behalf of the bondholders, and the Serbian Government did not reject this intervention, but contended that the service of the loans was being effected by it in full conformity with the obligations resulting from the contracts, a view which was not shared by the French Government. As from this point, therefore, there exists between the two Governments a difference which, though fundamentally identical with the controversy already existing between the Serbian Government and its creditors, is distinct therefrom; for it is between Serbia and France, the latter acting in the exercise of its right to protect its nationals. The case therefore is admissible not merely from the point of view of form: it also relates to a dispute between Parties of the category contemplated by Article 14 of the Covenant and Article 34 of the Statute. It only remains to consider whether the actual subject of the dispute, which relates only to questions of fact and of municipal law, prevents the Court from dealing with it.

This question the Court answers in the negative. Whilst admitting that, in general, the true function of the Court is to decide disputes between states on the basis of international law, it is not accurate to say that only questions of international law may form the subject of the Court's decisions. Under Article 36, paragraph 2 (the Optional Clause), of the Statute, jurisdiction is given in legal disputes concerning "the existence of any fact which, if established, would constitute a breach of an international obligation". Clearly, amongst others, disputes concerning pure matters of fact are contemplated, for the states concerned may agree that the fact to be established would constitute a breach of an international obligation. Is the case altered if the point at issue between two states falls to be decided by application of the municipal law of a particular country? When the two states have agreed to have recourse to the Court, its duty to exercise jurisdiction cannot be affected by the circumstance that the dispute relates to a question of municipal law rather than to a pure question of fact.

Having established the jurisdiction of the Court, the judgment proceeds to consider in detail the terms of the bonds and coupons of the different loan issues, and points out that in every case the bonds describe the loan as a "gold loan" or as being for a sum of "gold francs", and the coupons either provide for payment in gold or carry the words ". . . % Gold loan".

The Serbian Government urged that the promise to pay gold francs is without legal significance. It was said that there was no international gold franc; that the reference was to money and not to gold as merchandise, and must be taken to be to French money; that the French monetary unit was silver and that there was no "gold franc" as a monetary unit. Hence it was insisted that, despite the terms of the engagement, the promise must be construed as one to pay in French currency.

In reply to this contention the Court observes that, as it is fundamental that the terms of a contract qualifying the promise are not to be rejected as superfluous, and as the definitive use of the word "gold" cannot be ignored, the question is: What must be deemed to be the significance of that expression? It is conceded that it was the intention of the Parties to guard against the fluctuations of the Serbian *dinar*, and that, in order to procure the loans, it was necessary to contract for repayment in foreign money. It is quite unreasonable to suppose that the parties were intent on providing for the giving in payment of mere gold specie without reference to a standard of value. So to treat the gold clause would be not to construe but to destroy it.

The "gold franc" was a well-known standard of value, internationally accepted, and defined by French, Belgian, and Swiss laws. As this standard was adopted by the parties, it is not admissible to assert that it should not govern the payments because the depreciation in French currency was not foreseen when the contracts were made. The question is not what the parties actually foresaw, or could foresee, but what means they selected for their protection.

It was further argued by Serbia that the acceptance by the bondholders of depreciated paper francs after 1919 operated as an estoppel against them. This contention is rejected by the Court on the ground that there had been no clear representation by the bondholders upon which the debtor state was entitled to rely and had relied. There had been no change in its position. The Serbian debt remains as it was originally incurred; the only action taken by the debtor state had been to pay less than the amount owing. It does not even appear that the bondholders could have effectively asserted their rights earlier than they did, much less that there is any ground for concluding that they deliberately surrendered them.

Moreover, the plea of *force majeure* cannot be accepted. The economic dislocations caused by the war did not affect the legal obligations of the contracts between Serbia and the bondholders, or release the debtor state.

Having thus established the meaning which was to be attached to the terms of the Bonds, the Court proceeded to consider a Serbian contention to the effect that the obligations entered into are subject to French law, which renders a clause for payment in gold null and void.

As regards the question whether it is French law which governs the contractual obligations in this case, the Court made the following observations:

"Any contract which is not a contract between states in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law or the doctrine of the conflict of laws. The rules thereof may be common to several states and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between states. But apart from this, it has to be considered that these rules form part of municipal law.

"The Court, which has before it a dispute involving the question as to the law which governs the contractual obligations at issue, can determine what this law is only by reference to the actual nature of these obligations and to the circumstances attendant upon their creation, though it may also take into account the expressed or presumed intention of the Parties.

"Before proceeding to determine which this law is, it should, however, be observed that it may happen that the law which may be held by the Court to be applicable to the obligations in the case, may in a particular territory be rendered inoperative by a municipal law of this territory—that is to say, by legislation enacting a public policy the application of which is unavoidable even though the contract has been concluded under the auspices of some foreign law.

"Again it should be observed that even apart from rules of public policy, it is quite possible that the same law may not govern all aspects of the obligation. The distinction which seems indicated for the purposes of this case is more particularly that between the substance of the debt and certain methods for the payment thereof.

"In the first place, the law governing the obligations at the time at which they were entered into must be determined. In the Court's opinion, this law is Serbian law and not French law, at all events in so far as concerns the substance of the debt and the validity of the clause defining it.

"The loans in question are loans contracted by the State of Serbia under special laws which lay down the conditions relating to them. These laws are cited in the bonds; and it appears that the validity of the obligations set out in the said bonds is indisputable in Serbian law. The bonds are bearer bonds signed at Belgrade by representatives of the Serbian Government. It follows from the very nature of bearer bonds that, in respect of all holders, the substance of the debt is necessarily the same, and that the identity of the holder and the place where he obtained it are without relevancy. Only the individuality of the borrower is fixed: in this case it is a sovereign state which cannot be presumed to have made the substance of its debt and the validity of the obligations accepted by it in respect thereof, subject to any law other than its own."

But, as the judgment points out, the fact that French law is not applicable as regards the substance of the debt does not prevent the currency in which payment must be made in France from being governed by French law. The Serbian Government cited a number of provisions of the French Penal Code and other legislation whereby gold payments were suspended in France and paper currency made the only legal tender. Upon these provisions it was argued that the law of France compelled every creditor to accept as due payment of a debt in French francs inconvertible banknotes, at their face value, and rendered null and void any provision involving a distinction between these notes and metal currency.

The French Government, on the other hand, maintained that this construction was unsound and contrary to the law as stated by the Court of Cassation, which established that although a gold stipulation is null and void when it relates to a domestic transaction, this does not hold good in the case of international contracts, even when payment is to be effected in France.

The Court, being thus confronted with the task of deciding as to the meaning and scope of a municipal law, made the following observations:

"For the Court itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal and which, in its results, seems to the Court reasonable, would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing the selection of its members. It would be a most delicate matter to do so, especially in cases concerning public policy—a conception the definition of which in any particular country is largely dependent on the opinion prevailing at any given time in such country itself—and in cases where no relevant provisions directly relate to the issue in question. It is French legislation, as applied in France, which really constitutes French law, and if that law does not prevent the fulfilment of the obligations in France in accordance with the stipulations made in the contract, the fact that the terms of legislative provisions are capable of a different construction is irrelevant.

"In these circumstances, the Court will confine itself to observing that, according to the information furnished by the Parties, the doctrine of French Courts, after some oscillation, has now been established in the manner indicated by the French Government, and that consequently there is nothing to prevent the creditor from claiming in France, in the present case, the gold value stipulated for."

For these reasons, the Court gave judgment as follows:

"(1) That, in regard to the Serbian 4% loan of 1895, the holders of bonds of this loan are entitled, whatever their nationality may be, to obtain, at their free choice, payment of the nominal amount of their coupons due for payment but not paid and of those subsequently falling due, as also of their bonds drawn for redemption but not refunded and of those subsequently drawn, at Paris, Berlin, Vienna, and Belgrade, in the currency in circulation at one of these places;

"(2) That, in regard to the 4% 1895, 5% 1902, 4½% 1906, 4½% 1909, and 5% 1913 Serbian loans, the holders of these bonds are entitled to obtain payment of the nominal amount of their coupons due for payment but not paid and of those subsequently falling due, as also of their bonds drawn for redemption but not refunded and those subsequently drawn, in gold francs, in the case of the 1895 loan, at Belgrade and Paris, and, in the case of the 1902, 1906, 1909, and 1913 loans, at Belgrade, Paris, Brussels, and Geneva, or at the equivalent value of the said amount at the exchange rate of the day in the local currency at Berlin and Vienna, in the case of the 1913 loan, and at Berlin, Vienna, and Amsterdam, in the case of the 1902, 1906, and 1909 loans.

"(3) That the value of the gold franc shall be fixed between the Parties, for the above-mentioned payments, as equivalent to that of a weight of gold correponding to the twentieth part of a piece of gold weighing 6 grammes 45161, 900/1000 fine."

This judgment was arrived at by a majority of 9 to 3, Judges de Bustamante and Pessoa, and M. Novacovitch, the Serbian National Judge, dissenting.

JUDGMENT NO. 15. DELIVERED JULY 12, 1929.

The Brazilian Loans Case.[1]

THIS case was submitted to the Court by a Special Agreement concluded at Rio de Janeiro on August 27, 1927, between France and Brazil, and ratified on February 23, 1928, whereby the Court was asked to give judgment on the following question:

"With regard to the Brazilian Federal Government's 5% loan of 1909 (Port of Pernambuco), 4% loan of 1910, and 4% loan of 1911, is payment of coupons which have matured and are not barred by prescription at this date, and coupons which shall mature, as also repayment of bonds drawn for redemption but not actually paid which are not barred by prescription on the date of the Court's decision, or of bonds subsequently to be redeemed, to be effected by delivery to the French holders, in respect of each franc, of the value corresponding, in the currency of the place of payment at the rate of exchange on the day, to one-twentieth of a gold piece weighing 6·45161 grammes of 900/1000 fineness, or is such payment or repayment to be effected as hitherto in paper francs, that is to say, in the French currency which is compulsory legal tender?"

The facts of this case and the legal contentions raised were, generally speaking, similar to those described above in the Serbian Loans case, and the judgment proceeds broadly on the same lines. A passage relating to the function of the Court in connexion with municipal law, however, calls for quotation by reason of the further important observations made on this subject. In the present instance the Special Agreement contained a clause providing that: "In estimating the weight to be attached to any municipal law of either country which may be applicable to the dispute, the Permanent Court of International Justice shall not be bound by the decisions of the respective courts." The Judgment states that this is open to two possible interpretations. "According to one—keeping more strictly to the literal meaning of the words—the Court is not to regard itself as legally bound to follow the doctrine of the courts of the country the law of which it is applying; it remains however free to do so if it considers that its task should be limited to applying the municipal law in accordance with the construction placed thereon by the national courts. According to another interpretation—which might find support more particularly in the fact that questions similar to that submitted to the Court had already formed the subject of decision in French courts—the Court's duty would be to disregard the doctrine of the municipal courts and itself to determine that interpretation of the relevant legislation which seems, in its opinion, to be the most reasonable in the present case.

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[1] Series A, No. 20–21.

"The Court, in choosing between these two interpretations, must adopt that one which is in principle compatible with a proper appreciation of its nature and functions.

"Though bound to apply municipal law when circumstances so require, the Court, which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, is not obliged also to know the municipal law of the various countries. All that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied. And this it must do, either by means of evidence furnished it by the Parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken.

"Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.

"It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstances apply rules other than those actually applied; this would seem to be contrary to the whole theory on which the application of municipal law is based.

"Of course, the Court will endeavour to make a just appreciation of the jurisprudence of municipal courts. If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law. But to compel the Court to disregard that jurisprudence would not be in conformity with its function when applying municipal law."

In the result the Court gave judgment, by eleven votes to two, in support of the first alternative stated in the question set out above. Judges de Bustamante and Pessoa again dissented.

ORDER MADE ON AUGUST 19, 1929

Case of the Free Zones of Upper Savoy.[1]

ALTHOUGH this was not technically a judgment, it must be reported here as a decision equal in importance to any the Court has given.

The dispute in this case was a troublesome one of long standing between the French and Swiss Governments. It was referred to the Court by a Special Agreement signed on October 30, 1924, and ratified on March 21, 1928, after considerable difficulty and opposition in the French legislature. As stated in the preamble, the object of the arbitration was to obtain an interpretation of Article 435, paragraph 2, of the Treaty of Versailles, with its Annexes, and a settlement of all the questions involved in the execution of Article 435, paragraph 2.

Article 1 (1) of the Special Agreement stated that: "it shall rest with the Permanent Court of International Justice to decide whether, as between Switzerland and France, Article 435, paragraph 2, of the Treaty of Versailles, with its Annexes, has abrogated or has for its object the abrogation of the provisions of the Protocol of the Conference of Paris of November 3, 1815, of the Treaty of Paris of November 20, 1815, of the treaty of Turin of March 16, 1816, and of the Manifesto of the Sardinian Court of Accounts of September 9, 1829, regarding the customs and economic régime of the free zones of Upper Savoy and the Pays de Gex, having regard to all facts anterior to the Treaty of Versailles, such as the establishment of the Federal customs in 1849, which are considered relevant by the Court."

By Article 1 (2) "the High Contracting Parties agree that the Court, as soon as it has concluded its deliberations on this question, and before rendering any judgment, shall accord to the two Parties a reasonable time to settle between themselves the new régime to be applied in those districts, under such conditions as they may consider expedient, as provided in Article 435, paragraph 2, of the said Treaty. This time may be extended at the request of the two Parties".

Article 2 provided that "failing the conclusion and ratification of a convention between the two Parties within the time specified, the Court shall, by means of a single judgment rendered in accordance with Article 58 of the Court's Statute, pronounce its decision in regard to the question formulated in Article 1 and settle, for a period to be fixed by it and having regard to present conditions, all the questions involved in the execution of paragraph 2 of Article 435 of the Treaty of Versailles".

By an exchange of notes between the Parties it was further agreed "that no objection shall be raised on either side to the communication by the Court to the Agents of the two Parties, unofficially and in each other's presence, of any indications which may appear desirable as to the result of the deliberation upon the question formulated in Article 1, paragraph 1, of the Arbitration Convention".

Article 435 of the Treaty of Versailles provides as follows:

(1) "The High Contracting Parties, while they recognize the guarantees stipulated by the treaties of 1815, and especially by the Act of November 20, 1815, in favour of Switzerland, the said guarantees constituting international obligations for the maintenance of peace, declare nevertheless that the provisions of these treaties, conventions, declarations, and other supplementary acts concerning the

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[1] Series A, No. 22.

neutralized zone of Savoy, as laid down in paragraph 1 of Article 92 of the Final Act of the Congress of Vienna and in paragraph 2 of Article 3 of the Treaty of Paris of November 20, 1815, are no longer consistent with present conditions. For this reason the High Contracting Parties take note of the agreement reached between the French Government and the Swiss Government for the abrogation of the stipulations relating to this zone which are and remain abrogated.

(2) "The High Contracting Parties also agree that the stipulations of the treaties of 1815 and of the other supplementary acts concerning the free zones of Upper Savoy and the Gex District are no longer consistent with present conditions, and that it is for France and Switzerland to come to an agreement together with a view to settling between themselves the status of these territories under such conditions as shall be considered suitable by both countries."

The annexes to this article contain the text of notes exchanged between the French and Swiss Governments in which the latter acquiesced in its provisions subject to certain conditions and reservations, including the statement that "the Federal Council would not wish that its acceptance of the above wording [i.e. Article 435, paragraph 2] should lead to the conclusion that it would agree to the suppression of a system [i. e. the régime of the free zones] which has been well tested".

The case having been fully argued before the Court in the customary manner, the Order refers at the outset to the fact that the Court at the present stage is not asked to render judgment, but simply to accord to the two Parties a reasonable time to settle the "new régime" between themselves. Reference is then made to the suggestion that the Court should communicate to the Agents unofficially indications as to the results of its deliberations, and to this request the Court declines to accede, as being contrary to the spirit and letter of its Statute. On the other hand, it is recognized that, as agreement between the Parties has hitherto proved impossible because of their inability to agree in regard to the interpretation of Article 435, it would be useless to grant them time within which to conclude this agreement without informing them what, in the Court's opinion, is the correct interpretation. Further, seeing that the judicial settlement of international disputes is simply an alternative to direct and friendly settlement between the Parties, it is for the Court to facilitate such settlement, so far as is compatible with its Statute. As it is possible to give effect in all essential respects to the common will of the Parties, by indicating, in the grounds of the Order granting to the Parties the time referred to in Article 1 (2) of the Special Agreement, the result of the Court's deliberations upon the question formulated in Article 1 (1), the Court adopts this course. At the same time, express warning is given that special agreements whereby international disputes are submitted to the Court should henceforth be formulated with due regard to the precise terms of the constitutional provisions governing the Court's activity, in order that it may be able to deal with such disputes in the ordinary course and without resorting, as in the present case, to a construction which must be regarded as strictly exceptional.

With regard to the substantive question in issue, the Court states, first of all, that, in accordance with the provisions of the Special Agreement, its function is limited to determining the reciprocal rights and obligations arising under Article 435, paragraph 2, of the Treaty, with its Annexes, as between France and Switzer land, apart from the legal relations as between signatories of the Treaty resulting from this article. The Order then proceeds to consider the position of the Parties under the relevant treaty provisions. It draws attention to the contrast between paragraph 1 and paragraph 2 of Article 435, from which it appears that the expression "are no longer consistent with present conditions" in the latter paragraph does not *ipso facto* involve the abolition of the free zones. In any event, Article 435 is not binding on Switzerland, which is not a Party to the Treaty of Versailles, except to the extent to which that country has itself accepted it. This is determined by the note in the Annex, from which it is clear that Switzerland did not consent to the abolition of the free zones, even if Article 435 could be read in that sense.

From an examination of the earlier treaties and supplementary acts referred to in that article, the Court reaches the conclusion that these instruments, as regards the zones of Upper Savoy, confer a contractual right on Switzerland to the withdrawal of the French customs barrier, and as regards the district of Gex establish that the intention of the Powers was to create in favour of Switzerland a right to the same withdrawal. The Court adds that having reached this conclusion simply on the basis of an examination of the situation of fact in regard to this case, it is unnecessary to give a decision as to the extent to which international law takes cognizance of the principle of "stipulations in favour of third parties".

The Court, therefore, holds that Article 435, paragraph 2, of the Versailles Treaty, as between France and Switzerland, neither abrogates the earlier provisions relating to the free zones, nor has for its object the abrogation thereof. The High Contracting Parties in Article 435, paragraph 2, have not drawn from their statement as to the inconsistency of those earlier provisions with present conditions any consequence other than that it is for France and Switzerland to come to an agreement together with a view to settling between themselves the status of these territories under such conditions as shall be considered suitable by both countries, without in any way prejudging the question of the contents of this agreement. Such agreement, therefore, may or may not, according to the common will of the Parties, lead to the abrogation of the régime of the free zones. Having regard to the Swiss reservation cited above, it is impossible to conclude that the provisions of the Treaty of Versailles under construction are intended necessarily to lead to abrogation, thus compelling Switzerland to accept abrogation as the only possible basis for the future agreement between herself and France.

The operative part of the Order "accords to the Government of the French Republic and to the Government of the Swiss Confederation a period expiring on May 1, 1930, to settle between themselves, under such conditions as they may consider expedient, the 'new régime' to be applied in the districts contemplated by Article 435, paragraph 2, of the Treaty of Versailles".

Judge Nyholm, Deputy-Judge Negulesco, and M. Dreyfus, French National Judge, whilst concurring in the operative part of the Order, dissented from the reasons, and delivered separate opinions.

Judge Pessoa, whilst concurring in the Order, expressed the view that logically the Court should have refused to entertain the case.

JUDGMENT NO. 16. DELIVERED SEPTEMBER 10, 1929.

Jurisdiction of the Commission of the River Oder.[1]

THIS case was referred to the Court by a Special Agreement between the United Kingdom, Czechoslovakia, Denmark, France, Germany, and Sweden, on the one hand, and Poland, on the other, the questions for decision being as follows:

"Does the jurisdiction of the International Commission of the Oder extend, under the provisions of the Treaty of Versailles, to the sections of the tributaries of the Oder, Warthe (Warta), and Netze (Notec) which are situated in Polish territory, and, if so, what is the principle laid down which must be adopted for the purpose of determining the upstream limits of the Commission's jurisdiction?"

The Oder Commission, consisting of representatives of the above-mentioned states, was set up in March 1920 under Article 341 of the Treaty of Versailles, and the questions now raised were the source of difficulties within that body at an early stage. They were in the first instance referred to the Advisory and Technical Committee of the League, and this procedure of conciliation having failed, were submitted to the Court as stated above.

The contention of the six first-named Powers was that the jurisdiction of the Commission does extend to the sections in Polish territory in so far as such sections fulfil the condition of navigability laid down by Article 331 of the Treaty of Versailles, and that the principle which must be adopted to determine the upstream limits of the Commission's jurisdiction is that these limits should include all sections of the rivers in question which are covered by the provisions of Article 331.

The Polish Government contended that the first question should be answered in the negative and that this followed from a correct interpretation of Article 331.

There was no dispute as to the meaning of the word "jurisdiction" (of the Commission). As the Court itself stated, this word relates to powers possessed by the Commission under treaties in force; the controversy concerned the territorial limits of these powers.

In the course of the proceedings the Six Governments relied upon the Barcelona Convention relating to waterways of international concern—which, it was common ground, is the "general Convention" referred to in Article 338 of the Treaty of Versailles—but the Court ruled that that instrument was inapplicable because Poland had never ratified it, and that the case must accordingly be decided solely with reference to the Treaty of Versailles.

Article 331 of that Treaty provides as follows:

"The following rivers are declared international:

the Elbe (Labe) from its confluence with the Vltava (Moldau), and the Vltava (Moldau) from Prague;

the Oder (Odra) from its confluence with the Oppa;

the Niemen (Russstrom–Memel–Niemen) from Grodno;

the Danube from Ulm;

"and all navigable parts of these river systems which naturally provide more than one state with access to the sea, with or without transhipment from one vessel to another; together with lateral canals and channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems, or to connect two naturally navigable sections of the same river."

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[1] Series A, No. 23.

The point at issue was the meaning of the words "all navigable parts of these river systems which naturally provide more than one state with access to the sea".

It was not disputed that the Warthe and the Netze rise in Poland and, after flowing for a long way through Polish territory, form the German-Polish frontier for a certain distance, and then pass into German territory, where the Netze flows into the Warthe before that river joins the Oder.

The judgment of the Court states that:

"The actual wording of Article 331 shows that internationalization is subject to two conditions: the waterway must be navigable and must naturally provide more than one state with access to the sea. These are the two characteristics by which a distinction has for a long while been made between the so-called international rivers and national rivers.

"The navigability of the Warthe (Warta) and the Netze (Notec) in Polish territory being assumed, the Court has to deal only with the second condition, namely, whether that part of the two tributaries which is above the German frontier may be regarded as providing more than one state with access to the sea, in the sense of Article 331 of the Treaty of Versailles. The Polish Government contends that that part of the Warthe (Warta) and of the Netze (Notec) respectively which is in Polish territory provides only Poland with access to the sea and that therefore it does not fall within the definition of Article 331. On the other hand, the Six Governments maintain that the condition prescribed by that article is fulfilled; for the fact of providing more than one state with access to the sea concerns the waterway as such and not a particular part of its course.

"It remains therefore to be considered whether the words 'all navigable parts of these river systems which naturally provide more than one state with access to the sea' refer to tributaries and sub-tributaries as such, in such a way that if a tributary or sub-tributary in its naturally navigable course traverses or separates different states, it falls as a whole within the above definition; or whether they refer rather to that part of such tributary or sub-tributary which provides more than one state with access to the sea, in such a way that the upstream portion of the tributary or sub-tributary is not internationalized above the last frontier crossing its naturally navigable course.

"In support of their argument, the Six Governments have submitted that the word *part* in Article 331 refers to *river systems*, and that a part of a river system, in the natural meaning of the terms, is one of the units composing the said system, namely, a tributary or sub-tributary. And they have endeavoured to support this interpretation by observing that, when in Article 331 it was intended to refer to a part of a waterway, the word *section* was used.

"The Court fully appreciates the value of this argument, but considers that it is not alone sufficient to show that the intention of the contracting Parties was to internationalize tributaries and sub-tributaries as such.

"Nor can the Court, on the other hand, accept the Polish Government's contention that, the text being doubtful, the solution should be adopted which imposes the least restriction on the freedom of states. This argument, though sound in itself, must be employed only with the greatest caution. To rely upon it, it is not sufficient that the purely grammatical analysis of a text should not lead to definite results; there are many other methods of interpretation, in particular, reference is properly had to the principles underlying the matter to which the text refers; it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of states.

"The Court must therefore go back to the principles governing international fluvial law in general and consider what position was adopted by the Treaty of Versailles in regard to these principles.

"It may well be admitted, as the Polish Government contend, that the desire to provide the upstream states with the possibility of free access to the sea played a considerable part in the formation of the principle of freedom of navigation on so-called international rivers.

"But when consideration is given to the manner in which states have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one state, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief, it is at once seen that a solution of the problem has been sought, not in the idea of a right of passage in favour of upstream states, but in that of a community of interest of riparian states. This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian states in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian state in relation to the others.

"It is on this conception that international river law, as laid down by the Act of the Congress of Vienna of June 9, 1815, and applied or developed by subsequent conventions, is undoubtedly based.

"If the common legal right is based on the existence of a navigable waterway separating or traversing several states, it is evident that this common right extends to the whole navigable course of the river and does not stop short at the last frontier; no instance of a treaty in which the upstream limit of internationalization of a river is determined by such frontier rather than by certain conditions of navigability has been brought to the attention of the Court.

"It therefore remains to consider what is the position adopted in this matter by the Treaty of Versailles. In contradistinction to most previous treaties which limit the common legal right to riparian states, the Treaty of Versailles and the other peace treaties which almost textually reproduce the essential provisions of the former Treaty, adopted the position of complete internationalization, that is to say, the free use of the river for all states, riparian or not. Article 332 grants freedom of navigation on waterways declared international in the previous article to all Powers on a footing of perfect equality. This provision would be inappropriate, if not arbitrary, if the freedom stopped short at the last political frontier."

The Court notes, in addition, that as regards the principal rivers themselves, Article 331 fixes the limit from which they are internationalized without taking any account of the last political frontier—geographical points within the territory of the last upstream riparian state were everywhere chosen—and observes that this fact, which corresponds with the principles of international fluvial law summed up above, is hardly in accordance with the Polish contention which, if it were well founded, should apply to the principal river as much as to the tributaries.

The Court, therefore, answered the first question at issue in the affirmative.

With regard to the second question, the judgment notes that the Special

Agreement does not ask the Court to fix the upstream limits of the jurisdiction of the Oder Commission, but only to say what is the law which should govern their determination. It follows from what has been said that this law is to be found in Article 331 of the Treaty of Versailles, with the result that the jurisdiction of the Commission extends up to the points at which the Warthe and the Netze cease to be either naturally navigable or navigable by means of lateral channels or canals which duplicate or improve naturally navigable sections or connect two naturally navigable sections of the same river.

This judgment was given by nine votes to three, Judges de Bustamante and Pessoa, and Count Rostworowski, Polish National Judge, dissenting.

It should be added that in the course of the proceedings the Polish Government sought to give in evidence passages from the minutes of the Commission which drafted the Ports, Waterways, and Railway clauses (Part XII) of the Treaty of Versailles. The Six Governments objected, and the Court after hearing arguments on this point ruled, by separate Order, that the evidence was inadmissible. The particular ground upon which this decision is based is that as three of the Parties concerned in the present case did not take part in the work of the Conference which prepared the treaty, the record of this work could not be used to determine, in so far as they were concerned, the import of the treaty; and no account could be taken, in any particular case, of evidence which is not admissible in respect of certain of the Parties to that case.

The Court, moreover, declined to consider arguments drawn from independent provisions and diplomatic negotiations, on the ground that such arguments cannot modify the conclusion which it has reached by means of a direct interpretation of the provisions applicable in the particular case.

ALEXANDER P. FACHIRI.

DECISIONS OF THE UNITED STATES WAR CLAIMS ARBITER UNDER THE SETTLEMENT OF WAR CLAIMS ACT OF 1928.

BY an Act of Congress, approved March 10, 1928, provision was made for the final disposition of all war claims of the United States and its nationals against Germany, Austria, and Hungary, and of those countries and their nationals against the United States, and for the ultimate return of enemy property seized and still held by the United States Alien Property Custodian.[1] Judge Edwin B. Parker was elected as sole arbiter to determine these claims. On October 31, 1928, he rendered an elaborate administrative decision (No. I) in which he construed that part of the above-mentioned Act[2] which related to patent claims, and announced the principles and rules by which he would be governed in deciding claims of this nature against the United States. The claims under this head arose out of patents alleged to have been used by or for the United States or under which it acquired a licence or other interest from German, Austrian, or Hungarian nationals during the World War. The Arbiter construed his jurisdiction to be limited to the determination only of claims for the use of patents which had been subjected by the Custodian to war measures, and to the fixing of a fair compensation to be paid by the United States for what it took or received for its own use or benefit. He announced that he would reject all claims for compensation for patents or licences seized by the Custodian and assigned by him to the Chemical Foundation, Inc., a private corporation. Claims for alleged use by the United States of trade marks, not being embraced within the terms of the Act of Congress, were not therefore within the jurisdiction of the Arbiter. Under this interpretation of the Act numerous claims have been dismissed as not being within the jurisdiction of the Arbiter.

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[1] See the *Year Book* for 1928, p. 129.

[2] *Decisions and Opinions* of the Claims Arbiter, pp. 1 ff., also *Amer. Jour. of Int. Law*, Jan. 1929, p. 193.

On December 12, 1928, Judge Parker issued administrative decision No. II[1] in which he announced the rules which he would apply in determining what constitutes "fair compensation" in patent claims. His aim, he said, would be to arrive at an amount which, in all probability, would have resulted from fair negotiation between a citizen of the United States, who was willing to sell or license his patent, on the one part, and the Government of the United States, which desired to buy the patent or acquire the grant of a licence, on the other part. In arriving at the amount he would weigh all the relevant facts in each case but neither the value to the owner nor to the United States would control. He then enumerated a long list of factors which would be taken into account. Claims based on remote or consequential damages alleged would not be considered.

What is a "merchant vessel"?

On March 9, 1929, the Arbiter issued administrative decision No. III[2] in which he interpreted the provisions of the War Claims Act which charged him with the determination of "fair compensation" to be paid by the United States for any enemy merchant vessels seized under the authority of the joint resolution of Congress of May 12, 1917. Nearly 100 such vessels had taken refuge in ports of the United States at the outbreak of the war in Europe and had been taken over by the United States in pursuance of this resolution. It was necessary first of all to determine what is a "merchant vessel". This clearly comprehended only privately owned vessels and excluded German public vessels, title to which was acquired by capture and for which no duty of compensation existed. Prior to and during the World War, said the Arbiter, naval vessels were of two general classes: (1) fighting ships, including auxiliary cruisers (converted merchantmen), and (2) auxiliary vessels of all descriptions. Both classes were public ships. In addition, frequent use had been made by navies of privately owned and operated merchant vessels which did not lose their character as merchant vessels while being privately operated for private profit under naval charter. It was true that, generally speaking, German merchant vessels received subventions from the German Government or were by agreement subject to use by the German Government in time of war. But such use did not change their status as private merchant vessels unless it was of a nature to convert them from private to public vessels or to impress them with the characteristics of war ships. Such conversion cannot be accomplished without a physical change in the equipment of the vessel, a fact which can be readily determined. Among such vessels, for which claims for compensation were made, were the *Kronprinz Wilhelm* and the *Prinz Eitel Friedrich*, which by their construction were designed for ready conversion and use as auxiliary cruisers and had in fact been so converted or used. The claims were accordingly dismissed.

As to merchant vessels like the *Locksun* which served as tenders under charter to the Admiralty or as colliers to German warships, the Arbiter held that they were excluded from the right of compensation. Merchant vessels such as the *Princess Alice* which carried reservists, provisions, and other supplies to German warships but which were never converted into auxiliary cruisers, which were never armed, carried a naval crew or placed on the Admiralty list, were vessels for which the Arbiter was empowered to award compensation. The services rendered by them were such as "any neutral merchant vessel might have been chartered to perform without affecting her status as a merchant vessel".

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[1] *Decisions and Opinions*, p. 50; also *Amer. Jour. of Int. Law*, July 1929, pp. 659 ff.

[2] *Decisions and Opinions*, p. 83, and *Amer. Jour. of Int. Law*, July 1929, pp. 673 ff.

In the case of the *Liebenfels*, the Arbiter held that a German merchant vessel which had been sunk in the harbour of Charleston by her master and crew in such a manner as to constitute an obstruction to navigation, and which after abandonment by the owner was taken possession of by the United States, was not among the vessels for which compensation was provided by the Act of 1928.

The contention of counsel for the United States that acts of sabotage committed upon German merchant vessels by their crews, under instructions of the German Government, when war between the United States and Germany appeared to be imminent, had the effect of converting such vessels into hostile enemy property and of depriving them of their character as merchant vessels, was rejected by the Arbiter. It was not apparent, he said, how acts of sabotage as such could change the status of ships from merchant vessels into hostile vessels of war, when they were not used for any hostile purpose.

In the case of *Ships seized in Cuban ports*,[1] the Arbiter held that four German merchant vessels seized by the Government of Cuba in August 1917, and turned over to the United States to be used in the prosecution of the war against Germany, did not fall within the category of vessels for which Congress intended that compensation should be made. Without considering it necessary to inquire into Cuba's title to the vessels, he said it was sufficient that the United States accepted them as a loan for use during the war, that it continued to recognize Cuba's title until it returned them in 1920, and that at no time did it assume "to take title" to them under the joint resolution of Congress of the United States of May 12, 1917, which authorized the seizure of enemy ships in the ports of the United States. Moreover, the records of Congress showed that it was the clear intention of that body to exclude these vessels from the category of ships for which compensation was to be made.[2]

JAMES W. GARNER.

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[1] *Decisions and Opinions*, p. 75.

[2] Judge Parker's untimely death on October 30, 1929, at the age of 61 years, before his work as war claims Arbiter was finished, deprived the United States and indeed the world of one of its ablest and most judicially minded jurists. His fairness as umpire of the German-American Mixed Claims Commission, which disposed of some 12,000 claims involving more than $1,000,000,000, caused him to be selected as the sole arbitrator of the War Claims of the United States against Austria and Hungary, a task which he had finished before his death. His selection was one of the few instances in history in which a national of one of the parties to an arbitration was chosen as the sole arbitrator. The same may be said of his selection as umpire of the German-American Mixed Claims Commission. For a time he also served as Commissioner on the American-Mexican Mixed Claims Commission. He combined in an unusual degree the gifts of a lawyer, a judge, and a scholar. He was deeply interested in the advancement of the cause of arbitration and the study of international law and international relations, and he left the bulk of his fortune, which will amount ultimately to about

DECISIONS OF THE TRIPARTITE CLAIMS COMMISSION (UNITED STATES, AUSTRIA AND HUNGARY) EDWIN B. PARKER, SOLE COMMISSIONER.

Nationality of Claim. Loss of Protection.

The case of Henry Rothman v. *Austria and Hungary*[1] involved a somewhat similar question to that decided by the United States-Mexican Mixed Claims Commission in the *Costello* case (*infra*), namely, the effect of section 2 of the Act of Congress of 1907 which provides that when a naturalized citizen of the United States resides for two years in the state from which he came or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, provided, however, that he may rebut the presumption by satisfactory evidence. The claimant in this case sought compensation for damages alleged to have been sustained on account of being compelled to perform military service in the army of Austria, his native country, during the World War, and for confiscation of his property. At the time the alleged damages were sustained, the presumption of having ceased to be an American citizen had, in the opinion of the Department of State, already risen against him. The claimant contended that his return to the United States in 1919, where he has since resided, had retroactively overcome the presumption which had arisen against him at the time he was conscripted into the Austrian army. Judge Parker rejected this contention, and, while declining to express an opinion on the *prospective* effect of a return to the United States of one against whom the presumption of expatriation had arisen during his residence abroad, held that it could not operate *retroactively* so as to confer American nationality on a claim which had arisen at a time when the claimant had ceased to be entitled to the protection of the United States. The purpose of section 2 of the Act of 1907 would, he said, be defeated if a claimant who at the time the acts forming the basis of his claim were committed had ceased to be entitled to the protection of the United States, could, subsequent to those events, overcome the presumption of expatriation and then demand as an American citizen the support of the United States Government for the collection of damages resulting from acts against which he was not at the time they were committed entitled to protection. The nationality of his claim must be determined by his status at the time his claim arose, and, not being entitled to the protection of the United States at that time, his claim could not be impressed with American nationality by his subsequent return to the United States even though it might have the effect of operating prospectively to overcome the legal presumption which had arisen against him.

$2,000,000, for the establishment of a post-graduate school for the teaching of these subjects.

Roland W. Boyden,* an American citizen, has been selected as his successor to determine some 2,000 claims which remained undisposed of at the time of Judge Parker's death.

[1] Decided July 11, 1928. Text in *American Journal of International Law*, January 1929, pp. 182 ff.

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* Mr. Boyden is well known in Europe, having served as American Observer on the Reparation Commission from 1920 to 1923. [Ed. B. Y. B.]

DECISIONS OF THE AMERICAN-MEXICAN MIXED CLAIMS COMMISSION 1928–9.[1]

(Continued from the *Year Book* for 1927, pp. 179–86, and 1928, pp. 156–64.)

Responsibility for Acts of Insurgents and Government Troops.

The case of *Solis* v. *the United Mexican States*[2] involved a claim of the United States for compensation for cattle, some of which were taken from the claimant's ranch by the de la Huerta revolutionary forces, others by the Government troops. Mexico denied its responsibility for the taking of property by the revolutionary forces, and it relied upon the established doctrine as enunciated in the cases of the *Home Missionary Society* (American and British Claims Arbitration under the Special Agreement of August 18, 1910, Nielsen's Report, 423), and the *Aroa Mines* (Ralston, *Venezuela Arbitrations*, 1903, p. 344). The claimant contended that the federal troops stationed near his ranch made no effort to protect his property against seizure by the insurgents' forces. The Commission admitted that the capacity of the authorities to give protection and their disposition to employ the means available to furnish it affected the question of responsibility, but, the evidence of neglect in this case not having been produced, Mexico was held not to be responsible.

As to the claim for compensation on account of the seizure of cattle by the Government forces, Mexico denied responsibility on the ground that, according to the well-recognized rule of international law, a state is not responsible for malicious acts committed by straggling soldiers in their private capacity. The Commission had already in the Youmans Case (November 23, 1926) held that the participation of soldiers in a murder could not be regarded as acts committed in their private capacity, when at the time they were on duty under the immediate supervision of and in the presence of a commanding officer. In the present case the soldiers were encamped on the claimant's ranch for about a month and the Commission assumed that they must have been under the command of a responsible officer. They were not therefore stragglers and Mexico was liable to pay compensation for the damages committed by them. The Commission cited in this connexion the case of the *Zafiro* decided by the Anglo-American Mixed Claims Commission under the agreement of 1910 (Nielsen's Report 579) where a distinction was made between acts committed by soldiers by order of or in the presence of an officer and those committed by stragglers not under his command or in his presence.

Right of neutral vessel to trade with port in hands of insurgents.

In the case of the *Oriental Navigation Company* v. *the United Mexican States*,[3] the United States claimed an indemnity for losses sustained by the claimant company on account of one of its vessels having been prevented by the Mexican gunboat *Agua Prieta* from unloading a part of its cargo and from taking on a new cargo at the port of Frontera which was in the hands of insurgents and which had been closed to international trade by decree of the Mexican Government. The Government of the United States based its claim on the principle of international law that a port in the hands of insurgents can be rightfully closed to neutral trade only by means of an effective blockade. Mexico in its denial of liability referred to the fact that the belligerency of the insurgents had not been recognized by any foreign state, and consequently the Mexican Government in virtue of its sovereignty had a right to close to foreign trade this and the other ports which were in the possession of the insurgents. It was therefore solely a matter of Mexican law and not of international law.

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[1] The decisions here summarized are found in a volume entitled *Opinions of Commissioners under the Convention concluded Sept. 8, 1923, as extended by the Convention signed August 16, 1927, between the United States and Mexico.* Washington Government Printing Office, 1928. It contains the opinions rendered between Sept. 26, 1928, and May 17, 1929. The Commissioners were Kristian Sindballe (presiding) of Denmark, Fred K. Nielsen, United States, and G. F. MacGregor of Mexico.

[2] *Opinions of the Commissioners*, p. 48.

[3] *Opinions*, 23.

Two of the three commissioners held that Mexico was not liable, although they denied the contention of the Mexican Government that the question of its right to close the port, even in time of war, was purely a matter of Mexican law. In time of civil war, they declared, when the control of a port has passed into the hands of insurgents, it is held nearly unanimously, by a long series of authorities, that international law will apply and that neutral trade is protected by rules similar to those obtaining in case of war.

The Mexican Government had in its case argued that the law governing neutral trade with insurgent ports was not the same as before the World War; particularly was this true of the old rules of blockade, which were not followed during that war. The invention of the submarine had altered the requirements as to what constitutes a legal blockade, and the Covenant of the League of Nations recognized and sanctioned resort to economic warfare through the means of a boycott and blockade.

Without expressly approving this view, the two concurring commissioners expressed the opinion that the action of the *Agua Prieta* could hardly be regarded as a violation of the law obtaining prior to the World War. It was true that, according to that law, neutral trade with the port of Frontera was perfectly lawful and the Mexican Government would not have been justified in capturing or confiscating the American vessel. Nevertheless, the Mexican authorities were not obliged to permit foreign vessels to trade with an insurgent port without clearance documents prescribed by Mexican law. In fact the port of Frontera was not entirely in the hands of the insurgents since it was partly commanded by the gunboat *Agua Prieta*. That being the case, the lawfulness of the action of the gunboat in forcing off a neutral vessel which had not supplied itself with proper clearance papers could hardly be challenged. The American Commissioner, Nielsen, dissented in a lengthy opinion in which he rejected the distinction which the Mexican Government made between the right to close a port in the possession of insurgents whose belligerency has been recognized and one in the possession of those who have not been so recognized, and maintained that there was no right under international law to close a port in either case except by means of a legal blockade. In support of this contention, he relied upon the authority of Lord John Russell, Moore, Oppenheim, Wilson, and others.

What constitutes "distress" of a merchant vessel?

In the case of *Hoff, Administratrix,*[1] the United States was awarded the sum of $5,000 with interest at 6 per cent. from April 24, 1884, to the date of the last award of the Commission (it amounted to nearly $14,000) on account of the action of the Mexican authorities in seizing and confiscating a small American-owned schooner with its cargo, which, without a manifest for certain parcels of merchandise constituting a portion of the cargo, entered a Mexican port because of distress of weather. When the vessel entered the port it was, as a result of a storm, in a disabled condition and appeared to be in danger of sinking. The master was arrested on the charge of attempting to smuggle and was kept in prison for more than two months. Because of his refusal or inability to pay the penalties assessed, the schooner and cargo were sold and the proceeds turned into the Mexican public treasury. The American Government contended that there was no evidence to sustain the charge of attempted smuggling and that the vessel, having entered the Mexican port in distress, was immune from the local jurisdiction so far as it involved the application of the customs laws. The Mexican Government denied that the condition of the vessel was such as to justify the claim of distress, and the argument was advanced that there was no settled rule of international law as to what constitutes distress. The Commission discussed at some length the principle of international law that a foreign merchant vessel in distress which seeks refuge from storm in the port of another country is exempt from the operation of local laws relating to the conditions of entry, sojourn, and departure. The authority of learned text writers and the decisions of national and international tribunals were referred to in support of this principle. As to what constitutes distress, the Commission thought it was possible to formulate certain reasonably concrete criteria which would be applicable in the present case and it added: "Assuredly a ship floundering in distress resulting either from the weather or from other causes need not be in such a condition that it is dashed helplessly on the shore or against rocks before a claim of distress can properly be invoked in its behalf. The fact that it may be able to come into port under its own power can obviously not be cited as conclusive evidence that the plea is unjustifiable." It also suggested that an important consideration in determining the question is the lack or existence of evidence in a particular case of a fraudulent attempt to circumvent the local laws.

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[1] *Opinions*, 174.

Right of Heir to recover for personal injuries sustained by deceased person.

The case of *Dujay*[1] involved the question of the survival of the right of action for personal injuries. The claimant, as the representative and executrix of the estate of an American citizen, then deceased, who had been wrongfully imprisoned in Mexico in 1884 (he happened to be the master of the schooner in the *Hoff* case *supra*), sought to recover damages for personal injuries which the latter had sustained during his lifetime and for which Mexico was responsible. The Mexican Government denied that a right of action on account of personal injuries survived the death of the injured party. The Commission, after reviewing various decisions of international tribunals, notably the *Underhill* and *Metzger* cases, came to the conclusion that the common law maxim *actio personalis moritur cum persona* is not binding upon an international tribunal charged with deciding the question whether there has been a failure on the part of a Government to fulfil its obligations under international law or whether its authorities have committed acts for which it is responsible according to that law. The claim of an heir or legal representative for damages on account of personal injuries suffered by a decedent during his lifetime was held to be a property right which fell within the jurisdiction of the Commission. Municipal law might prescribe whether or not certain kinds of actions arising under such law could be maintained before a national tribunal, but it could not prescribe what actions could be maintained before an international tribunal. Otherwise we should have the *reductio ad absurdum* that redress for personal injuries conformably to international law might be obtained in a country like Venezuela, where the principles of the civil law with respect to the survival of actions may exist, whereas no redress for the same violation of international law could be obtained in another country where the principles of the common law were in force. It would be a strange decision, the Commission added, which would have the effect of precluding an international tribunal from making a final pronouncement upon the merits of a controversy because some rule of a particular system of jurisprudence places certain limitations on rights of action under domestic law.

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[1] *Opinions*, 180.

Loss of Nationality.

In the case of *Costello* v. *the United Mexican States*,[1] the question was raised as to the effect of Section 2 of the Act of the United States Congress of March 2, 1907, relative to the expatriation of American citizens, which declares that when a naturalized citizen shall have resided for two years in the foreign state from which he came or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, provided, however, that such presumption may be overcome by the presentation of satisfactory evidence to a diplomatic or consular officer of the United States. Whether the citizenship of a person who fails to rebut the presumption referred to, as Costello had failed, is terminated, or whether he merely loses the right of protection while resident abroad, had never been decided by the Supreme Court. Attorney General Wickersham, however, had given an opinion on December 1, 1910, that it had only the latter effect, the object of the Act being merely to relieve the Government of the obligation to protect naturalized citizens after residence abroad sufficiently long to create the presumption that they did not intend to return to the United States. After an examination of various decisions by the inferior federal courts and by high administrative officials, the Commission came to the conclusion that the opinion of Mr. Wickersham was correct. It pointed out also that the only recognized method by which the citizenship of a naturalized American can be terminated by act of the Government is the cancellation of his naturalization certificate through judicial proceedings. No Act of Congress expressly confers such power on the Department of State and it did not seem reasonable to suppose that Congress intended by the Act of 1907 to prescribe a forfeiture of citizenship through residence abroad, in the absence of explicit language such as is used when it provides for the loss of citizenship by naturalization abroad or the taking of an oath of allegiance to a foreign country.

Costello was therefore held to be still an American citizen, although he had, in the opinion of the Department of State, lost his right of protection by the United States. Upon his return to the United States to reside there, the Government might, if it saw fit, extend its protection to him. (Compare *Rothman* v. *Austria and Hungary*, *supra.*)

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[1] *Opinions*, 252.

Denial of Justice. Failure to punish Criminals—Responsibility for acts of minor judicial officials.

In the case of *Chase* v. *the United Mexican States*,[1] the United States was awarded $5,000 for the failure of the Mexican authorities to try and punish a Mexican national for having seriously wounded the claimant. The assailant appears to have been arrested, but was released on a bond of 300 pesos in January 1914, and was never brought to trial. The Commission expressed the opinion that "International justice is not satisfied if a Government limits itself to instituting and prosecuting a trial without reaching the point of defining the defendant's guilt and assessing the proper penalty".

In the case of *Way*,[2] the United States was awarded the sum of $8,000 for the denial of justice resulting from the unwarranted conduct of a Mexican Alcalde in connexion with the killing of an unarmed American citizen named Way. The Alcalde, a police magistrate who exercises judicial functions, was held responsible for the murder because he had issued what the Mexican courts had held to be a void warrant to arrest Way to two men who shot and killed him without cause. All three persons were punished, but the Alcalde, who was regarded as chiefly responsible, was let off with imprisonment for a year and fifteen days which, the American Government contended, was wholly inadequate. The Mexican Government appears to have denied its responsibility because the act complained of was that of a minor judicial magistrate. The Commission had already held in the *Massey* case[3] that a state is responsible for the acts of its minor officials, and in the present case it affirmed its earlier opinion that when misconduct on the part of public officials, whatever their precise status may be under domestic law, results in the failure of a nation to live up to its obligations under international law, the nation must bear the responsibility. The fact that the Alcalde in the present case exercised certain judicial functions did not relieve Mexico of responsibility for his misconduct in issuing an illegal warrant of arrest which while being executed resulted in the unjustifiable killing of an American citizen. And it added: "Under international law a nation has responsibility for the conduct of its judicial officers."[4]

In the case of *Dyches*[5] the United States was awarded the sum of $8,000 for undue delay in the conduct of judicial proceedings against an American citizen accused of an offence for which the maximum penalty was imprisonment for one year, but which on account of the delay, actually amounted to two years and a half. The accused was sentenced by the trial court to a term of imprisonment for six years and nine months. Upon appeal to the Supreme Court of the State, the penalty was increased to eight years and five months. From this decision an appeal was taken to the Supreme Court of Mexico which held that the crime for which the accused had been tried, namely, theft, was not theft, whereupon the State Supreme Court amended its decision and held that the imprisonment which the accused had already undergone was sufficient punishment. Since the Supreme Court of Mexico had corrected the error of the local courts, it might be said that there was no denial of justice. This would have been true and Mexico would not have been responsible, said the Commission, had it not been for the long and unreasonable delay of the proceedings in a simple case, which resulted in the correction of the error, but during which time the accused suffered punishment, including maltreatment in jail, far in excess of that which the law prescribed.

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[1] *Opinions*, 17 ff.

[2] *Ibid.*, 94.

[3] See the *Year Book* for 1928, p. 162.

[4] This thesis is discussed by me in an article in the *Year Book* for 1929, pp. 181 ff.

[5] *Opinions*, 193.

But in the case of *McCurdy*[1] the Commission held that the existence of certain irregularities in the trial of an accused, when they are matters of form rather than of substance, does not necessarily constitute denial of justice, nor does the trial of a man three times in succession when there was probable cause to justify prosecution and insufficient evidence that the Mexican law had been maliciously applied by the courts. Contention of American counsel that the provisional detention of the accused was not justifiable because according to Mexican law the establishment of the *corpus delicti* was required, was rejected by the Commission on the ground that if this were necessary from the beginning, many crimes would go unpunished. It might also be said, the Commission added, that a municipal statute requiring it would be contrary to international law, since it might interfere with the duty of a state in the discharge of its primary duty of administering justice.

Unlawful Arrest and Maltreatment in Prison:

In the case of *Kulklosch,*[2] the United States was awarded the sum of $300 for the arrest of an American citizen without warrant and without sufficient cause and for his maltreatment while in prison. The claimant was 58 years old and at the time was in delicate health. He was imprisoned in a filthy cell for three days and nights where he had to sleep on a cement floor without bed or blanket, and was not permitted to provide himself from his own home with the proper clothing for the confinement which he had to undergo. Subsequently he was removed to another jail where he was confined for four days and nights, after which he was released, there being no evidence against him.

In the case of *Dillon* v. *the United Mexican States,*[3] an award of $2,500 was made to the United States on account of the unlawful detention of an American citizen for about fifteen days, during which period he was kept *incommunicado* and uninformed of the reason of his detention. The charge that he was also maltreated was not sustained by sufficient evidence.

Failure to take proper measures to apprehend murderers—Inadequacy of punishment.

In the case of *Canohl,*[4] the sum of $5,000 was awarded to the United States for the failure of the Mexican authorities to take effective measures to apprehend the murderers of an American citizen in 1915, although they were known to the authorities. The Mexican Government denied the charge of negligence and pleaded the existence of disturbed conditions in the locality where the crime was committed, due to the Villa revolution which prevented more effective steps at the time. It was further contended that Mexico could not be held responsible for the acts of revolutionary forces who were in control of that part of the state where the crime was committed.

It appears that three of seven persons suspected of the crime were arrested and orders were given for the arrest of the others, but they were never apprehended. In the meantime the Carranza authorities had recovered control of the community in which the crime was committed. Regarding the Mexican contention that there is no continuity between a mere revolutionary faction and the Government of a country, the Commission thought it could not be sustained in the sense in which it was sought to give effect to it in this case. The Commission readily admitted that the change of authority due to internecine disturbances might seriously interfere with the discharge by a Government of its functions and it was willing to make proper allowance therefor. But it saw no reason why the authorities should ignore a murder merely because it had been committed three weeks before the rebel forces were driven from the community in which it had been committed. It would have been different if the rebel forces had been in possession for years after the murder was committed and if the records had in the meantime been destroyed. But this was not the situation in the present case.

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[1] *Opinions*, 137.

[2] *Ibid.*, 126.

[3] *Ibid.*, 61 ff.

[4] *Ibid.*, 90.

In the case of *Boyd* v. *the United States,*[1] the United States was awarded $5,000 for the failure of the Mexican authorities to take appropriate measures to apprehend and punish a group of bandits who murdered an American citizen. A *posse* was not sent in pursuit until several days after the authorities were informed of the crime, and orders for the arrest of one of them whose identity was known were not made until six months after the crime was committed. The offenders were never apprehended and punished.

Laxity and Inadequacy of Punishment.

In the case of *Connolly,*[2] Mexico was condemned to pay the United States $2,500 for failure of the authorities to take prompt measures to apprehend the murderers of two American aviation lieutenants, who were also robbed, for failure to prosecute them for robbery as well as homicide and for failure to inflict adequate punishment on them. The court refused the request of the public prosecutor to issue warrants for the arrest of the murderers, and when subsequently one of them was arrested by the police, the same judge released him, although the accused had already confessed that he and his comrade were guilty. After a long delay the latter was also arrested. Both were finally convicted and sent to prison each for a term of five years. The Commission held that the laxity shown by the public authorities concerned was only partly redressed by the punishment finally imposed.

James W. Garner.

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[1] *Opinions*, 78.

[2] *Ibid.*, 87.

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF INTERNATIONAL LAW

DIGEST OF THE DECISIONS OF THE ENGLISH COURTS DURING THE YEAR 1929.

Introductory Note.[1]

THERE were fewer decisions on points of International Law—public or private—in 1929 than in most recent years. There was, however, another case concerning diplomatic privilege.

In the case of *Dickenson* v. *Del Solar* (1), an unmeritorious claim of an insurance company that it was not liable under a policy to indemnify a person possessing diplomatic status against claims by third parties when it had received from him premiums against third party risks, was rejected. The decision, besides being a satisfactory one from the point of view of the merits and of common sense, is helpful in clarifying and emphasizing some points connected with diplomatic privilege which were already supported by authority. The first is that the possession of diplomatic privilege creates only an immunity from process in the local jurisdiction which continues only so long as the privilege continues; it does not involve any immunity from legal liability. The acts of a person of diplomatic status are subject to the law, and any liability which he incurs may be enforced elsewhere, or, when he ceases to possess that status, in the local jurisdiction. (The operation of the Statutes of Limitation is suspended while the immunity lasts.) Secondly (and really this follows logically from the first), diplomatic immunity is not a ground of defence. Thirdly, an unconditional appearance to an action (at any rate when it is concurred in by the person entitled to claim the immunity) is a submission to the jurisdiction and, after such a submission, the court can proceed to judgment. Diplomatic immunity cannot then be raised as an objection later in the course of the proceedings.

Whether such an appearance must be construed as a submission also to execution of the judgment is another question which the Lord Chief Justice did not feel called upon to decide in this case. In the case of the *Duff Development Company* v. *The Government of Kelantan*[2] Lord Finlay and Lord Dunedin expressed the view that it could not be so construed and therefore that immunity could still be raised against execution. Lord Carson was, however, of the opposite opinion (Lords Cave and Sumner did not deal with this point).

The fourth point, which this case brings out clearly, is that the privilege of immunity belongs not to the individual diplomat but to his sovereign. Consequently in the case of a subordinate member of a Legation it is not for him to decide whether the privilege shall be claimed or waived. It is for his sovereign acting through his proper representative, the Head of the Mission.

The decision of the Court of Appeal in the case of *Foster* v. *Driscoll* (2) is likely in future to be the leading authority on that rule of Private International

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[1] The numbers in parentheses following the names of cases in this note refer to the number of the case in the digest which follows. All cases reported in the Law Reports for 1929 and in contemporary reports covering the same period are reviewed.

[2] [1924] A.C. 797, see *B.Y.I.L.*, 1926, at p. 218.

Law which is stated in Dicey (*Conflict of Laws*, 4th edition, Rule 160, Exception 3 (1), at p. 418) as follows:

"A contract (whether lawful by its proper law or not) is in general invalid in so far as . . . the performance of it is unlawful by the law of the country where the contract is to be performed." The judgment was delivered in connexion with a series of actions between co-adventurers in a venture to realize large profits out of the disposal of whisky which was eventually to find its way into the United States in defiance of the prohibition laws. The venture miscarried and the whisky never left Scotland, and it had not been determined whether it was actually to be introduced into the United States by one of the parties or sold to bootleggers on the high seas or in Canada. All the members of the Court of Appeal treated this rule as a rule of public policy, dictated by the obligations of comity, towards the foreign country where the contract was to be performed. There was, however, a difference of opinion in the Court as to its application in this case. The majority of the Court (Lawrence and Sankey L. JJ.) held the whole transaction to be void as contrary to public policy, with the result that no party could establish any claim upon it or obtain the assistance of the courts to enforce any rights against his co-adventurers. Scrutton L. J. took a narrow view of the rule. He thought, following in this respect some remarks in Dicey (*l. c.* at p. 620), that a contract must only be held invalid on this ground if it *necessitated* the performance of an illegal act in a foreign country, and held that where, as here, the adventure might have been completed by a sale on the high seas or in Canada where it was not illegal, the rule did not apply. This view is founded on the case of *Waugh* v. *Morris*,[1] where, however, the parties contracted in complete ignorance of any illegality. He held that the fact that the parties must, even if they did not themselves intend to do so, have contemplated that their purchasers would introduce the whisky into the United States, did not invalidate the transaction of the present parties. In so holding, Scrutton L. J. relied on the authority of the old cases like *Holman* v. *Johnson*[2] and *Pellicat* v. *Angell*,[3] where it had been held that a seller could maintain an action for goods sold and delivered although he knew that his buyer intended to smuggle the goods so bought. The majority of the Court, however, held that these cases were distinguishable from the present case where the introduction of the goods into the United States, either by the parties themselves or by others whom they had aided and abetted in doing so, was the essential basis of the extravagant profits which the adventure was designed to realize; and other old cases like *Clugas* v. *Penaluna*[4] and *Lightfoot* v. *Tenant*[5] tend to support their view. They also pointed out that there was another ground of distinction—namely that the prohibition laws of the United States were not merely revenue laws, though both L. JJ. strongly disapproved, as contrary to modern principles, the old dicta to the effect that the courts can take no notice of the revenue laws of another country. Indeed it seems doubtful whether, in view of these expressions of opinion and that of Scrutton L. J. in an earlier decision of the Court of Appeal, these dicta can any longer be said to be good law.

There are three more "Russian" cases which are worth notice. In the case of *Princess Paley* v. *Weisz* (3) the plaintiff, the widow of an Imperial Grand Duke, unsuccessfully attempted to recover from a dealer in England some valuable furniture and works of art, formerly in the Paley palace near Leningrad, taken by the Soviet Government and sold to the defendant in England. The claim was held by the Court of Appeal to be ill-founded on two grounds: (1) because under the law of Soviet Russia, the *lex situs* of the property, the plaintiff had been divested of all rights in the property; this was merely the application of the principle of Private International Law that the *lex situs* governs the title to movable property; (2) because in any case the property had been taken from the plaintiff in Soviet Russia by acts of persons which were authorized and adopted by the government which the Crown recognized as the government of an independent foreign state, and it would be contrary to the rules of international law and comity for the English court to sit in judgment upon and hold illegal by Soviet Russian law the acts of the recognized government of the country in its own territory. On this latter ground it was unnecessary, once it was proved that the defendant derived title from the government of the country to property situated in its territory at the time when the government took it, to determine whether or not the taking was or was not a valid transfer of property under the local law, if the government had purported to transfer the property.

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[1] L.R. 8 Q.B. 202.

[2] Cowp. 341.

[3] 2 Bing. 314.

[4] 4 T.R. 466.

[5] Bos & P. 551.

The Court of Appeal in their decision on this second ground gave expression to a broad principle which belongs as much to the realm of Public International Law as to Private International Law. It is not to be found clearly stated in the text-books, but in the first of the Russian cases, *Luther* v. *Sagor*,[1] Scrutton L.J. had adopted it as the ground of his decision, though the other members of the Court of Appeal in 1921 seem rather to have based their judgments on the narrower ground of a transfer valid by the *lex situs*. There are, however (the Court of Appeal quoted them in the Paley case), two well-known decisions of the Supreme Court of the United States where the Court stated and acted on this principle with regard to property, situate in United States territory at the time of the action, in the possession of persons to whom it had been sold by Mexican authorities who had seized it in Mexico, such authorities being revolutionary forces who were then, or subsequently became, recognized by the Government of the United States as the Government of Mexico. In the first of these cases the property had belonged before seizure to a Mexican citizen,[2] and in the second case to a United States citizen.[3] The latter case shows that for this purpose it is immaterial whether the expropriated owner is a national of the foreign state or not. Though it would be contrary to international law for the courts of another state to question the validity of the acts of the recognized government of an independent foreign state in its own territory, it does not follow that such acts can never be questioned at all. They may be acts which are contrary to international law if committed against a foreigner, and, as the Supreme Court said in a passage which is quoted in the judgments of the English Court of Appeal, "Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign Powers as between themselves." Though, so far as the action of a municipal court is concerned, the nationality of the expropriated owner is an irrelevant factor, the situation of the property at the time of the alleged expropriation is, as the three *Jupiter* cases[4] show, an essential factor. It is only with respect to the acts of a foreign government in its own territory (and therefore in relation to property situated therein) that the rule applies. If a private person claims title, under a transfer from a foreign government, to property which at the material time was situated outside that government's jurisdiction, then the municipal court can investigate whether that person's title is good and whether the foreign government had any legal title to transfer to him; though of course it cannot exercise jurisdiction over the foreign government directly or over the property while the foreign Government claims it (rightly or wrongly) as its own, for that would be attempting to exercise jurisdiction over a foreign sovereign.

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[1] [1921] 3 K.B. 532.

[2] *Oetjen* v. *Central Leather Co.*, 266 U.S. 297.

[3] *Ricaud* v. *American Metal Co.*, 246 U.S. 304.

[4] See the *Year Book*, 1926, p. 219; 1928, p. 176; *Law Reports*, [1924] P. 236; [1925] P. 69; [1927] P. 122 and 250.

Perry v. *The Equitable Life Assurance Society* (4) is merely a decision, applying to the case of a contract under a policy of life assurance, governed by Russian law as the proper law of the contract, and in circumstances where Soviet Russian legislation had cancelled all contracts of life assurance, the general rule that if a debt or other chose in action is extinguished under the law where it is situated or the proper law of the contract, it ceases to exist anywhere.

The decision of Wright J. in the case of *The Manufacturing Company I. A. Wormin Luetchg and Cheshire Limited* v. *Frederick Huth & Co.* (5) is a particularly interesting attempt to deal with a very peculiar situation created by Soviet legislation with regard to a Russian company. Unfortunately it does not appear in any of the Law Reports; the summary of the case in the Digest which follows is taken from a transcript of the judgment and has been made as full as possible.

The directors and a large proportion of the shareholders of a Russian trading company had transferred themselves to England and purported to continue the existence of the company in England, holding board meetings and a general meeting of shareholders. They commenced an action in the name of the company to recover a debt due to the company. The decision of Wright J. was one which was certainly in accordance with the common-sense view and merits of the case. In effect he recognized the capacity of the company to continue its existence in this form. Amongst other objections to the validity of the action instituted in the name of the company, the defendants pleaded the transfer of the management of the company from the directors to a National Board in Russia under a Soviet decree, and the abolition of all shares and shareholders' rights under another Soviet decree. Wright J. overruled these objections on the grounds that the effect of these decrees was confined to Russia and they did not affect the powers of the directors in England or the shares (which were bearer bonds) which had a local situation in England. The learned judge's decision on these points certainly departs a little from the principles which have been generally followed, since in general the principle is that the law of the country where a company is incorporated governs all questions relating to its constitution and the capacity of its directors to act in its name. (The decision of the Court of Appeal in the *Russian &c. Bank* v. *Comptoir d'Escompte de Mulhouse*, which held a Russian company non-existent everywhere if it had been extinguished by Russian law, was not overruled by the House of Lords on any ground of principle, but only upon the findings of the effect of Russian law, c.p. *The First Russian Insurance Co.* case, noted in the *Year Book* for 1929 at pp. 246 and 253); further, even bearer shares or bonds of a Russian company would appear to be in law locally situated at the place where the head office of the company was situated, i. e. in this case at the relevant time in Russia.

The last case, *Robinson* v. *Speakman* (6), illustrates the principle of *forum conveniens* as recognized in Scottish law, that is to say the principle under which a court, though possessing jurisdiction, may refuse to exercise it on the ground that the action may more conveniently be tried in a court in another country. The English courts are, under their practice, only in a position to take the principle into account in cases where they have a discretion, i.e. where leave for service out of the jurisdiction is required. (See for example the *Janera* (*Year Book*, 1929, p. 248) and *Shintz* v. *Warr* (*Year Book*, 1927, p. 190).)

1. *Dickenson* v. *Del Solar—Mobile and General Insurance Company Ltd. Third parties.* [1930] 1. K.B. 376. (Lord Hewart C.J.).

The plaintiff brought this action against the defendant, Del Solar, to recover damages for personal injuries suffered by him by reason of the negligence of the defendant in driving a motor-car by which the plaintiff had been struck. The defendant was insured with the insurance company against "legal liability" under the claims of third parties, and served on the insurance company a third-party notice, claiming that the company was liable under the policy to indemnify the defendant in respect of the plaintiff's claim and the defendant's costs in defending the action.

The defendant was First Secretary of the Peruvian Legation, but no claim of diplomatic immunity was raised by him and an unconditional appearance was entered in the action by the company on his behalf. The defendant refused to allow any claim of immunity to be inserted in the defence to the claim, and stated that he had been forbidden by the Peruvian Minister to make any such claim in this case.

The policy of insurance contained conditions, *inter alia* (1) that the "assured . . . shall not in any way act to the detriment or prejudice of the company's interests"; (2) that the "company is entitled to take absolute control of all negotiations and proceedings".

The jury found a verdict for the plaintiff for damages, and the company as third parties disputed their liability under the policy to indemnify the defendant, on the grounds (*a*) that the defendant, as a person possessing diplomatic privilege, was never under a legal liability to the plaintiff and consequently there was no claim coming within the terms of the policy; (*b*) that the defendant, in refusing to allow a plea of diplomatic immunity to be inserted in his defence, had acted in breach of the conditions of the policy above mentioned.

Held: (1) That a person covered by diplomatic immunity is not immune from legal liability but only immune from proceedings in the local jurisdiction, unless he submits to the jurisdiction, for so long as he possesses such diplomatic status. Consequently, the defendant was under a legal liability to the plaintiff and there was a claim arising under the policy.

(2) The privilege of immunity, which attaches to a person possessing diplomatic status, is the privilege, not of the individual in question, but of the sovereign by whom he is accredited, and the right of waiver of such privilege belongs to such sovereign. Consequently, the claiming and waiver of the privilege in this case was not a matter within the volition of the defendant who, having been forbidden by his official superior to make any claim to immunity, could not do so, and consequently his failure to do so could not be said to be a breach of the conditions of the policy.

(3) The entry of an unconditional appearance to the proceedings, which had been done on the defendant's behalf by the solicitor of the third parties, was itself a waiver of the privilege and a submission to the jurisdiction, and privilege could not thereafter be pleaded by way of defence, and the action must proceed to judgment.

The Lord Chief Justice refrained from deciding whether, after a submission to the jurisdiction as aforesaid, diplomatic immunity could be asserted as a bar to the execution of the judgment, since, even if it were so, execution might issue as soon as the defendant ceased to be a privileged person, and the judgment might be the foundation of proceedings against him at any time in Peru.

2. *Foster* v. *Driscoll & others. Lindsay* v. *Attfield. Lindsay* v. *Driscoll.* [1929] 1 K.B. 470 (C.A.)

The facts in this group of actions, which were tried together, are complicated. The statement of them which is given below is limited as far as possible to the facts relevant to the issue of illegality on the ground of public policy. L., a distiller of whisky; F., a financier; D. & M., shipbrokers; and A., a retired schoolmaster, entered into arrangements in England for equipping a steamship and loading her with a cargo of Scotch whisky to be conveyed across the Atlantic for sale in the United States, or alternatively, if that were not possible, for sale on the high seas or in Canada or some island sufficiently near the territory of the United States to facilitate its resale therein by the purchasers. The introduction of whisky into the United States and its sale therein was at all relevant times not only a violation of the revenue law of the United States, but also a criminal offence by the law of that country. Under the arrangements L. was to provide the whisky and load it at Leith or Glasgow into a vessel to be named by D. & M., and also to advance or guarantee certain sums of money required for the enterprise; F. was to provide most of the rest of the money required; D. & M. to find and equip a small steamer, and A. to arrange the disposal of the whisky on the other side of the Atlantic and receive the profits of the sale. Certain bills of exchange were to be given: (1) a bill for £5,500 drawn by F. on and accepted by A. and indorsed in favour of L.; (2) a bill for £4,812 drawn by L. on and accepted by A. and D. & M. These bills were to be held by L. In order to obtain the release of the whisky from bond and avoid the necessity of the payment of duty in the United Kingdom, it was necessary for L. to give notice to the revenue authorities of the intention to export, and the name and destination of the ship, and to give to these authorities a bond in a large sum to secure the shipping of the whisky in the vessel named and its export to and landing at the destination named and at no other place, the bond being discharged on production of a certificate of the landing at the port of destination. Such bonds could be obtained from surety ship associations at a reasonable rate, provided that the whisky was shipped on a vessel belonging to a regular line.

As, however, no bond would be obtainable from any association in respect of shipments in the small vessel which D. & M. would obtain, the arrangement was that the whisky was to be shipped in Scotland in a vessel belonging to some regular line and transhipped at some other port as near as possible to the United Kingdom (Dublin and Antwerp were mentioned) into this small vessel.

Most of the arrangements made (other than those relating to the disposal of the whisky on the other side of the Atlantic) were set out in a memorandum in writing between F., L., and D. & M. on October 26, 1927.

Difficulties and delays arose in the first place because D. & M. were unable to find and equip the small vessel, but a vessel called the *Wearholme* was eventually found. D. & M. however failed to name at the proper time a vessel of a regular line into which the whisky was to be shipped from Scotland. As the result of this L. handed over to D. & M. documents transferring to them the property in the whisky in the bonded warehouse and leaving them to complete the arrangements for its export. It was one of the points in dispute whether L. was or was not entitled to do this under the contract.

The first of the two bills which were to be given (£5,500) was drawn, accepted, and indorsed in England by the parties according to the arrangement, but was not stamped. The second bill contained the signatures of A. and D. & M. as acceptors, and was signed later by L. as drawer in Switzerland, who, when signing it, altered the date and substituted Lausanne for London as the place of drawing. It also was not stamped.

Before D. & M. had named any vessel and when the whisky was still in bond in Scotland, proceedings between the parties were commenced in the English courts.

F. claimed a rescission of the agreement and a declaration (1) that he was not bound under the agreement, (2) that the bill for £5,500 was void as being an inland bill and not stamped. He pleaded *inter alia* breach of contract by L. in transferring to D. & M. the property in the whisky in the bonded warehouse in Scotland.

L. denied that this action was a breach of contract, and claimed payment on the bills, or, alternatively, damages for breach of contract in failing to give a valid bill.

A. pleaded that the whole agreement was illegal and void as contrary to public policy.

In the court below, Wright J. decided:

(1) that the bill for £5,500 was void under the Bills of Exchange Act, because it was an inland bill and not stamped;

(2) that the bill for £4,812 was not enforceable against the acceptors, A. and D. & M., because of the alteration of the date and place;

(3) that L. had committed a breach of the contract with regard to the delivery of the whisky in bond, and could not maintain a claim for breach of contract.

Consequently, having rejected all claims on other grounds, he did not deal with the plea of illegality.

In the Court of Appeal, however, Scrutton and Sankey L.JJ. took a different view with regard to (3) and held that L. was, under the agreement, entitled to do what he had done.

Held by Lawrence and Sankey L.JJ.

(1) that the whole arrangement was a joint adventure in the nature of a partnership, in which all the parties, including L., were coadventurers, for the purposes of deriving profit from the import of whisky into the United States, a transaction which constituted a criminal offence in that country;

(2) that it was immaterial that the parties had not effected their purpose and no criminal offence had been committed or that the parties may have contemplated that if they could not themselves arrange to import the whisky they would only aid and abet other persons to do so;

(3) that the whole arrangement was illegal as contrary to public policy, and none of the arrangements or documents defining the rights and obligations of the parties *inter se* were enforceable in the English courts; it would be contrary to the obligations of international comity as now understood and recognized, if the English courts were to recognize or enforce such an arrangement;

(4) that, on the grounds above mentioned, all the claims of all the parties should be dismissed.

Scrutton L.J., dissenting, *held*:

(1) that, where it is sought to avoid a contract on the ground of public policy, that claim must be clearly established and, where such contract can be carried out in a legal as well as an illegal way, the parties must be given the benefit of the doubt and it must be assumed that they would do so without breaking the law;

(2) that a contract made in England should only be held invalid on the ground of illegality under a foreign law if its performance actually necessitated the commission of some act in a foreign and friendly country which was illegal;

(3) that the arrangements between the parties in the present case *might* have been carried out by a sale of the whisky in Canada or on the high seas without committing any act illegal by the law of any foreign country;

(4) that, if the transaction had been carried out in this way, the fact that the parties as sellers knew that their purchasers intended to smuggle the whisky into the United States would not render their transaction void.

3. *Princess Paley Olga* v. *Weisz.* [1929] 1 K.B. 718 (C.A.).

The plaintiff, the widow of the Grand Duke Paul of Russia, sued to recover from the defendants certain goods, or, alternatively, damages for their conversion.

In 1917 the goods in question—certain valuable furniture and works of art—were the property of the plaintiff and were in the Paley palace at Tsarskoe Selo, near Leningrad. In November 1917 the Soviet Government established itself in power in this part of Russia. In July 1918 certain persons, acting on behalf of the Soviet Government, came to the Paley palace and took possession of the palace and its contents against the will of the plaintiff. In August 1918 a decree of a body, called the Council of Commissaries of the Northern District Communes, purported to convert the palace and its contents into a state museum, and thereafter the palace was looked after by officials of the Commissariat of Education as a public museum. In February 1919 the plaintiff fled from Russia without a passport. In March 1921 a decree of the Council of People's Commissaries, a body which, under the constitution of July 1918, had mainly administrative powers only, although its decrees were from time to time accepted as legislation, declared to be the property of the R.S.F.S.R. all movable property of citizens who had fled outside the confines of the Republic, and further provided that the property of such persons which consisted of objects of art was to go to educational institutions under the Commissariat of Education. Further decrees of March and May 1912 and the Civil Code of 1923, though recognizing to some extent private property, provided that transfers of private property already expropriated in virtue of the revolutionary right should remain undisturbed. A decree of March 1923 provided that works of art, then in museums and depositaries and safeguarded at the expense of the state, should be recognized as state property.

The Government of the R.S.F.S.R. was recognized by the Crown as the *de facto* government of this part of Russia in 1921, and the government of the U.S.S.R. (of which the R.S.F.S.R. was a constituent part) as the *de jure* government of Russia in 1924.

The goods, the subject of this action, were in April 1928 sold by the Soviet Government to the defendant as part of the nationalized property of the Paley palace, and brought to England, and the plaintiff now brought an action for their recovery.

Held by the Court of Appeal (affirming MacKinnon J. on grounds (1) and (2) and overruling his decision to the contrary on ground (3)), that the action failed for the reasons that:

(1) the property when situated in Russia had passed under Russian law to the state under the decree of March 1923, and the plaintiff was divested of her ownership in it; (2) the property, when situated in Russia, had passed under Russian law to the state under the decree of March 1921, and the plaintiff's rights of ownership had been terminated; (3) whether or not the property had passed from the plaintiff to the state under Russian law by virtue of the various decrees above mentioned, and even if the title of the Soviet state was based upon force only, the acts of the persons who had seized it in Russia were adopted by the government who were recognized by the Crown as the *de facto* and *de jure* government of that country and it would be contrary to the rules of international law and comity with regard to the respect for the independence of a foreign state for an English court to sit in judgment upon the legality of the acts of the government of an independent foreign state within its own territory; and this rule applied just as much to cases involving the title to property subsequently brought within the jurisdiction of the court as to claims for damages based on the acts of such a government, and that consequently the Court could not question the validity of the title to the property which that government had passed to the defendant.

4. *Perry* v. *Equitable Life Assurance Society of the United States of America.* 45 T.L.R. 468 (Branson J.).

The plaintiff, a British subject, resident at that time in St. Petersburg, signed in 1903 an application form for the issue to him of a twenty-years endowment life assurance policy by the defendant company, and a policy, signed on behalf of the company in New York and countersigned by the manager of the company's branch office in St. Petersburg, was issued in the same year. The policy contained conditions and rules *inter alia* to the effect that all disputes arising out of the policy should be decided according to Russian law and in the Russian courts, and that if at any time the permission of defendant company to carry on life assurance business in Russia was withdrawn, accounts should be settled between the policy holder and the company in such manner as the Russian Government should direct. The premiums and sums due under the policy were payable at the St. Petersburg office of the company, and upon the death of the plaintiff or the expiry of twenty years the sum of 20,000 roubles was payable, and a proportionately smaller sum was payable if the plaintiff put an end to the policy at an earlier date. The plaintiff accepted the policy and paid the premiums at St. Petersburg until 1917, and after that date until 1919 further premiums were paid and accepted without prejudice in London. After 1919 the defendant company refused to accept any further premiums.

In December 1917 the Soviet Government came into power, and in December 1918 a monopolization decree of the R.S.F.S.R. came into force, making insurance a state monopoly and ordering the liquidation of all private insurance business in Russia.

In November 1919 a cancellation decree of the R.S.F.S.R. came into force (1) abolishing all life insurance, (2) cancelling all contracts entered into for the purpose of life assurance with insurance companies, (3) transferring to the state all insurance premiums.

The plaintiff claimed the payment of 10,000 roubles as being due to him in 1923 at the rate of 9·45 roubles to the pound sterling, the rate for the pre-war gold rouble, alleging that the defendant company, by refusing to accept payment of further premiums after 1919, had waived the right to receive them, or, alternatively, the payment of 8,000 roubles at the same rate, being a proportion of the total sum of 10,000 roubles due on the basis of the policy being terminated in 1919, or alternatively, the return of all premiums paid, as being money paid without any consideration.

The defendants pleaded (1) that the English courts had no jurisdiction in view of the condition in the policy that all disputes were to be submitted to the Russian courts, (2) that the contract was, as stated in the policy, governed by Russian law and had been determined by the cancellation decree of November 1919, (3) the Statute of Limitations.

Held: (1) That the policy was a contract which was governed by the law of Russia.

(2) (upon evidence of Russian law) that the contract had been dissolved by the Decree of November 1919, and that consequently all liabilities of the defendant company had been discharged.

(3) That the claim for the return of premiums was barred by the Statute of Limitations and in any event was not maintainable in view of the fact that the plaintiff had for a number of years enjoyed the protection of the policy.

5. *The Manufacturing Company I. A. Wormin Luetchg and Cheshire Limited and Cheshire* v. *Frederick Huth & Co.* K.B.D. [2nd May, 1928] (Wright J.). (Case not reported.)

The plaintiff company was a company incorporated before the war in Russia under Russian law with a capital of Roubles 6,000,000 divided into 6,000 shares, and owned a cotton mill in Petrograd. The shares in the company, with the exception of the directors' qualification shares, were in the form of bearer shares, and it was provided by the company's statutes that receipts for the deposit of share warrants at banks entitled the holder to vote at meetings. The company had no branch or agency in England. The defendant firm were the correspondents and bankers in England of the plaintiff company.

In 1917 a consignment of cotton, the property of the plaintiff company, was destroyed by fire. It was insured with English underwriters who paid £76,853 for the loss, which sum the defendant firm collected for the plaintiff company, bringing the credit account of the plaintiff company with the defendants to £81,988.

At a general meeting held in Petrograd in March 1917, the plaintiff Cheshire had been elected vice-chairman of the plaintiff company; W. was elected chairman, and B. and S. were also directors. Under the statutes of the company the directors held office for four years after the date of election in general meeting.

In November 1917 the second (Bolshevik) revolution took place in Russia, and the Soviet Government established itself in Petrograd. In February 1918 the plaintiff company requested the defendant firm, by letter, to invest in War Loan the sum of £40,000, part of the balance standing to the company's credit. In June 1918, by a letter signed by one of the directors, the defendants were asked to advance sums up to £5,000 to the plaintiff Cheshire, who had left Russia in 1917 and was in England.

A Decree of the Soviet Government of June 28, 1918, proclaimed as the property of the Soviet Republic all property of Joint Stock Companies engaged in the cotton industry with a capital of over Roubles 1,000,000.

In August 1918 a meeting was held, or purported to be held, in Petrograd, at which V.W., B.C., and L.M. were elected directors. At some date about the end of October 1918 the plaintiff company's cotton mill in Petrograd was forcibly seized by some persons acting under the authority of the Soviet Government, and no information exists as to its fate. A second Decree of the Soviet Government of October 1918 provided that owners of shares in textile companies must produce their shares for registration. A third Decree of November 1918 established a National Textile Board for the administration of all textile enterprises, and two further Decrees, of March 1919, provided for the financing of state enterprises as a matter of state finance, and ordered the cancellation of all shares in companies whose enterprises had been confiscated or nationalized.

During 1918 and 1919, of the seven directors of the plaintiff company referred to above, the chairman and B. and S. died. The plaintiff Cheshire, V.W. and B.C. came to England, and L.M. went to Paris. These four directors held, or purported to hold, directors' meetings in England in the years 1920, 1921, 1922, 1923, and 1924, at which resolutions were passed authorizing the plaintiff Cheshire to instruct the defendants to pay certain sums to shareholders of the plaintiff company, and until 1926 the defendants paid out these sums at the request of the plaintiff Cheshire. On March 19, 1926, the defendants intimated that on legal advice they had no alternative but to discontinue making such payments. In May 1926 the plaintiff Cheshire, V.W., B.C., and L.M. held an alleged board meeting in England and authorized the taking of proceedings against the defendants for the recovery of the War Loan and balance held by the defendants to the credit of the plaintiff company, and the writ in the present action was issued in July 1926 in the name of the plaintiff company, or alternatively in the name of the plaintiff Cheshire, on behalf of himself and all the other directors and shareholders in the plaintiff company.

In March 1927, after advertisements in *The Times* and attempts to advertise in a Moscow paper, an alleged general meeting of shareholders was held in England. At this meeting there were present, or represented, the holders, as evidenced by the production of deposit receipts for the deposit of their warrants in Russian banks, of some 4,000 shares, the holders being all resident outside Russia. Of the remainder of the 6,000 shares, the owners of some shares could not be traced, and others were held by persons inside Russia whose shares had presumably been produced for registration and annulled under the Soviet Decrees of October 1918 and March 1919.

This general meeting elected the plaintiff Cheshire and V.W., B.C., and L.M. directors for three years and ratified the institution of the action and authorized its continuance.

The defendants contended:

(1) That the plaintiff company had been extinguished by the Soviet Decrees of November 1918 and March 1919, and could not sue;

(2) That the bringing of the action in the name of the plaintiff company was not duly authorized and could not be authorized because:

(*a*) The resolution of May 1926 of the alleged directors of the plaintiff company instituting the action was invalid, because it was a resolution of persons having no longer any such status or authority, since, by the Decree of November 1918 the management of the plaintiff company was transferred from the directors to the National Textile Board, and by the Soviet Decrees the plaintiff company had been put into a state of liquidation, and only a liquidator (or person corresponding to him) could sue in the name of the company: alternatively, under the statutes of the company, the appointment of the four directors being for four years only, their appointment had lapsed before the bringing of the action;

(*b*) the alleged general meeting in England of March 1927 was not a general meeting of the company and could not validate any act because (i) the provisions of the statutes as to notice had not been complied with, (ii) no general meeting of the company could be held after March 1919 since by the Decree of that date all shares in the company had been abolished and the shareholders were deprived of all rights, (iii) generally, the statutes of the company had been deprived of validity and/or been rendered incapable of application.

(3) that the plaintiff Cheshire had no right to bring a representative action on behalf of himself and all other directors and shareholders;
and for the reasons given in (1), (2) and (3), the defendants entered an application that the name of the plaintiff company and the plaintiff Cheshire should be struck out of the writ.

The defendants also contended (4) that the title of the plaintiff company to the war bonds and money in the hands of the defendants had been taken away by the Soviet Decrees of June 1918 and November 1918.

In the interlocutory proceedings in the action it was ordered that the issue arising on the application should be reserved for the trial.

Held: (1) on the facts with regard to point (1) of the defendants' contentions:

that none of the Soviet Decrees relied upon by the defendants had the effect of extinguishing the plaintiff company as a legal entity (following in this issue of fact the findings in the cases of *Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse, the Employers' Liability Assurance Corporation* v. *Sedgwick Collins & Co.*, and the *Jupiter* No. 3, with regard to other similar decrees of the Russian Soviet Government) though their effect might be that in Russia the plaintiff company had no practical existence, that its property was taken away from it and its statutes could have no working effect, but its existence as an entity was not extinguished and it still existed.

(2) With regard to the contention No. (2) of the defendants (i.e. that the bringing of the present action in the name of the plaintiff company was not duly authorized) it was held that the Soviet legislation did not purport to invalidate the statutes of the plaintiff company and these statutes remained in force, though in Russia they could not be carried out; that the statutes must be interpreted in accordance with the law of Imperial Russia; that the Decree of November 1918 did not supersede the powers of the directors in England and vest them in the National Textile Board, since its effect was limited to Russia; that the Decrees did not have the effect of putting the plaintiff company in a state of liquidation nor create any liquidator; that, upon evidence of Imperial Russian law and upon the construction of the statutes of the company, if no general meeting was held within a period of four years, and no new directors were elected, the previous directors would have power, after the expiry of their period of office, to continue to take such action as was necessary to preserve the property of the company; alternatively, their resolution for the institution of the present action was confirmed and validated by a general meeting of the company in March 1927, which meeting was a valid general meeting, although the procedure followed involved certain departures from that laid down in the statutes of the company, but these statutes did not envisage circumstances such as those which existed, and must be construed as allowing some latitude in extraordinary circumstances, to the extent that departures from them which were inevitable and reasonable and must be held to be in accordance with the "general will of the partnership" must be allowed, and the departures in this case came within that principle. In any case, as the vast majority of the shareholders attended the meeting and approved the action, the shareholders could not therefore question the decision. Or, alternatively, if the meeting was not technically a general meeting, the action was valid as being action in accordance with the will of the majority of the company, since in these circumstances, on the analogy of certain English cases, a general meeting could be dispensed with. The effect of the Decree of March 1919 was limited to the territory of Russia and it could not have the effect of confiscating bearer shares which were held by persons outside Russia; these shares constituted choses in action with their own local situation which need not be that of the actual scrip or the original location of the share register, and in the circumstances of the present case the presence of the directors in England, their holding of board meetings in England and the presence of the vast majority of the shareholders in England must be held to give the company a residence in England in addition to the residence which it possessed in Russia, and the local situation of these shares must be held to be in England.

(3) It was held that as the action was validly brought in the name of the plaintiff company, it was unnecessary to express an opinion upon the right of the plaintiff Cheshire to bring a representative action.

(4) With regard to point (4), that the Soviet confiscatory Decrees did not purport to, and in any case could not, have the effect of transferring the ownership of the bonds and balances of the plaintiff company in the hands of the defendants in England, since this property was not situated in the jurisdiction of the Soviet Government and such decrees could have no exterritorial effect (following the *Employers' Liability Assurance Corporation* v. *Sedgwick Collins & Co.*, and the *Jupiter* No. 3).

(5) That the plaintiff company's claim to the bonds and money standing to their credit was established.

6. *Robinson* v. *Speakman*. House of Lords. [1929] W.N. 287.

Robinson died leaving a will in the English form, appointing executors and trustees, who were the appellants in this action.

The appellants had obtained administration of the estate from the English courts in 1919 in proceedings to which the respondent, who was the widow of Robinson, was not a party, and had obtained a certificate from the Master to the effect that Robinson was domiciled in England. The respondent claimed that Robinson had died domiciled in Scotland and that, consequently, under Scots law she was entitled to be paid a certain sum out of the estate under her right of "terce and *ius relictae*". She instituted proceedings against the present appellants in the Scottish courts, claiming (1) a declaration that the domicil of Robinson was Scottish, (2) payment of the said sum. The appellants pleaded *inter alia* (1) that the proceedings should be dismissed on the ground that the English courts were the *forum conveniens*, (2) that the question of domicil was *res iudicata*, (3) that Robinson died domiciled in England.

Upon evidence that the respondent could bring an action in England to have the domicil of Robinson determined, the Lord Ordinary dismissed the action on the ground of *forum non conveniens*. Upon an appeal by the respondent, the First Division of the Court of Session reversed that decision, holding that the Scottish courts were the *forum conveniens*. Upon a further appeal to the House of Lords, Lord Dunedin, delivering the judgment of the House, *held*: (1) that the issue as to domicil was one of fact with respect to which both the English and Scottish courts were equally competent.

(2) That there had been no *litis contestation* in the proceedings in England and the issue as to domicil was not *res iudicata*.

(3) The claim of the respondent was a claim against the appellants for a debt, and there was no ground for dismissing the respondent's action on the ground of *forum non conveniens*. It would have been different if it had been an action by a beneficiary against trustees, turning on the terms of the trust deed, which should be tried in the country where the trust was being administered.

DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

Interpretation of Treaties—Liberal Construction.

In the case of *Jordan* v. *Tashiro*[1] it was held that a commercial treaty between the United States and Japan, which authorized citizens of Japan to lease land for residential and commercial purposes and generally to do anything incident to or necessary for trade, upon the same terms as American citizens, included the right to operate a hospital as a business undertaking and to lease land for that purpose. This case was distinguished from those of *Terrace* v. *Thompson* 263 U.S. 197 and others in which the Court had already held that the same treaty did not authorize the acquisition, lease, or use of land by Japanese nationals for *agricultural* purposes. In the present case the Court declared that the obligations of treaties should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them, and that where a treaty fairly admits of two constructions, one restricting the rights that may be claimed under it and the other enlarging them, the more liberal construction is to be preferred. Where a treaty confers specifically enumerated privileges upon the nationals of the other party it includes the right to employ the usual methods and instrumentalities, such as a corporate agency, which may be necessary or incidental to their exercise.

The Same: Tax Discrimination on account of alienage.

In the case of *Nielsen* v. *Johnson*[2] the Supreme Court held that a statute of Iowa, which levied a tax on estates inherited by non-resident aliens when no such tax was imposed upon citizens of the United States, was in conflict with a treaty of 1826 between the United States and Denmark, which provided that no higher taxes should be levied by either party upon inheritance of the citizens of the other than upon its own citizens. The tax imposed by the Iowa law upon non-resident aliens was clearly discriminatory since it was based on alienage. It was the substantial equivalent of the ancient *droit de détraction* which it was the object of the High Contracting Parties to prohibit, as was shown by the diplomatic correspondence preceding and subsequent to the execution of the treaty. The rule laid down by the Supreme Court in *Jordan* v. *Tashiro* (*supra*) in regard to the liberal construction of treaties was affirmed.

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[1] Decided November 19, 1928.

[2] Decided February 18, 1929.

Effect of War on Treaties.

In the case of *Karnuth et al* v. *United States et al.*[1] the Supreme Court held that the provision of Article 3 of the Jay Treaty of 1794 between Great Britain and the United States, which stipulated for the free passage of nationals of the two countries across the Canadian boundary line, was terminated by the War of 1812. The case arose out of the enforcement of the United States immigration law of 1924 in connexion with the right of Canadians to cross and recross the boundary between the two countries. The Court discussed at some length the views of text writers and the decisions of the courts regarding the effect of war upon treaties, and pointed out that while there was general agreement that some treaties were unaffected by war between the parties, there were differences of opinion as to what treaties fall within this category. It happened that the courts of both the United States and Great Britain had already passed upon the question of the survival of Article 9 of the Jay Treaty in so far as it related to titles to real estate, and both had held that this article had not been affected by the War of 1812.[2] The United States Circuit Court of Appeals had apparently regarded these decisions relative to Article 9 as authority for the view that the Jay Treaty as a whole, including Article 3, had survived the War of 1812 and was therefore still in effect. The Supreme Court in the present case, however, maintained that the two articles related to "fundamentally different things". Article 9 aimed at perpetuity and dealt with existing rights, vested and permanent in character—rights "which are fixed and continuing regardless of war or peace". But the "privilege" accorded by Article 3 had no "obligatory existence apart from that instrument"; it was in no sense a "vested right"; it was not "permanent" in its nature; it was "wholly provisory and prospective" and necessarily ceased to operate during the existence of a state of war.

The Court did not overlook the fact that Article 28 of the treaty declared that the first ten articles should be regarded as "permanent" and that the subsequent articles, except the 12th, should be limited in their duration to twelve years. But the word "permanent", it thought, was not intended to be synonymous with "perpetual" or "everlasting", but merely meant that they were not limited to a specific period of time as was the case with the remaining articles.

The question may now be raised whether this line of reasoning does not apply to the remaining provisions of Article 3 and also to Article 1. Articles 2, 4, 5, 6, and 7 have already been carried into effect. Article 9, in virtue of the two decisions referred to above, remains in effect and the same is undoubtedly true of Article 10. These two articles would seem to be all that is left of a famous treaty, concluded 136 years ago, which has occupied an important place in the diplomatic and judicial history of the United States.

Ineligibility of Pacifist Woman to Naturalization.

In the case of *United States* v. *Rosika Schwimmer*[3] the Supreme Court, overruling the United States Circuit Court of Appeals, held that an alien woman over fifty years of age, otherwise highly qualified for citizenship of the United States, was not eligible to naturalization because she was unwilling to pledge herself to take up arms if necessary for the defence of the country.

The laws now in force require an applicant for naturalization to declare on oath that he will "defend the Constitution and laws of the United States against all enemies" and that the court issuing the naturalization certificate shall be satisfied that he has during the past five years "behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same". Madame Schwimmer was willing to take the oath of allegiance to the United States without reservation and declared her readiness to discharge any duty required of American citizens except to bear arms and fight. She added that she was an uncompromising pacifist; that it was purely a matter of conscience with her and that she had no sense of nationalism but only a cosmic consciousness of belonging to the human family.

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[1] Decided April 8, 1929.

[2] *Society, &c.* v. *New Haven*, 8 Wheaton 464, and *Sutton* v. *Sutton*, 1 Russ. & M. 663.

[3] Decided May 27, 1929.

The Court distinguished between two types of pacifists, those "who seek to maintain peace and to abolish war" and those who refuse or are unwilling to bear arms for any purpose, because of conscientious scruples, and who encourage others in such refusal. The influence of the latter, the Court thought, is likely to to be more detrimental than their mere refusal to bear arms; they are not "attached to the principles of the Constitution" and are not therefore, if aliens, eligible to naturalization under the laws of the United States.

Three of the nine justices of the Supreme Court dissented from this view and Mr. Justice Holmes wrote a vigorous opinion in which he attacked the reasoning of Mr. Justice Butter who gave the opinion of the majority. He pointed out that Mme. Schwimmer was a woman over 50 years of age and that she would not be allowed to bear arms even if the law required military service of women. He did not think her belief in pacifism and her opposition to war as a method of settling international disputes indicated lack of attachment to the principles of the Constitution, any more than one's belief in the superiority of the British system of Cabinet government or his disbelief in the wisdom of the Eighteenth Amendment. On the contrary, her optimism and faith in the possibility of abolishing war seemed to be a better argument for her admission to American citizenship than any he could offer. Character, intelligence, and conduct, rather than beliefs, unless they are dangerous and subversive of authority, should be the test of the fitness of an alien to become a citizen of the United States, and he added: "if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate." Referring to the Quakers, whose opposition to the bearing of arms is well known and who have "done their share to make the country what it is", he said: "I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount". The decision in this case has been the subject of considerable criticism in the United States and a bill was promptly introduced in Congress providing that belief in pacifism should be no bar to naturalization.

James W. Garner.

REVIEWS OF BOOKS

Académie de Droit International: *Recueil des Cours*, 1928. 5 volumes, in all 2,762 pages. Published under the authority of the Curatorium of the Academy by the Librairie Hachette, Boulevard Saint-Germain, Paris.

These five volumes, Nos. 21–5, of the *Recueil* contain the text of the twenty-three courses of lectures delivered on behalf of the Academy of International Law at The Hague in 1928. The lecturers are drawn from many different countries, no less than thirteen different nationalities being represented, but as is the rule at the Academy, the lectures were all delivered in French and are published in that language.

Dr. McNair of Cambridge and Professor Brierly of Oxford contribute two of the courses. The former gives an admirable series on the termination and dissolution of treaties. Each of the methods which can bring about the cessation of the operation of a treaty is discussed in detail and is illustrated by the relevant decisions which have been given by international or other tribunals, or by the cases which have been the subject of diplomatic discussions. Dr. McNair's lectures form a most useful and instructive contribution.

Professor Brierly deals with the juridical foundation of the binding character of International Law. It is to be hoped that Professor Brierly will incorporate these lectures in some work published in English so that they may be available to all students of International Law in this country. The lectures show how far we have advanced from the Austinian conception of law, and the extent to which the earlier conceptions of sovereignty prejudice the recognition of the obligatory character of International Law.

Of the remaining courses, four are devoted to questions of Private International Law. Dr. Kuhn of New York deals with American doctrine and practice as regards Private International Law, excluding criminal law, bankruptcy, nationality, and domicil. M. Arminjon conducts an inquiry on a semi-philosophical basis into the object aimed at in Private International Law and the means by which that object is to be attained. He shows how greatly the complications of the problems of Private International Law have increased in modern times and terminates with the somewhat discouraging conclusion that Private International Law will not really exist until it can furnish sufficient material for a code running into many hundreds, or even thousands, of articles. Dr. Barbosa de Magalhaes of Lisbon contributes an exhaustive study of Domicil, and Mr. Bagge, formerly President of one of the Divisions of the Anglo-German Mixed Arbitral Tribunal in London, gives a most interesting course on conflicts of law in connexion with contracts for the sale of movables. This is a subject of particular importance at present because of the efforts which the Private International Law Conference at The Hague is making to formulate an acceptable convention on the subject, and of the investigation which the Institute at Rome for the Unification of Private Law is undertaking as to the extent of the divergencies between the various national laws on sale of goods.

The remaining seventeen courses all deal with questions of Public International Law. Many of them are excellent. M. Pilotti, formerly of the Legal Section of the Reparation Commission, discusses unions of states, and accords particular attention to the structure of the British Empire. He declines to accept the view that the Empire is unique and *sui generis*, and classes it among the "real unions". To him the Empire as a whole is not a state but has juridical personality. Each of the autonomous units of the Empire is a state. M. Pilotti concludes the section on the British Empire by an attempt to extend the famous formula of 1926 defining the nature of the Imperial structure, and to give it that completeness beloved of those accustomed to codified law.

Professor Werner of Geneva gives a course on prisoners of war, and Professor Janne of Liège on the international regulation of Customs Restrictions.

The international régime of the Scheldt is dealt with by Professor Pintor of Florence, who explains the points where the interests of Holland and Belgium come in conflict and the efforts which have been made to find a new conventional basis, acceptable to both parties, in substitution for that of 1839.

Dr. Crusen, President of the Supreme Court at Danzig, contributes a course on "international servitudes", a term which is used to cover all contractual restrictions on the sovereignty of a state. As such, Dr. Crusen finds that servitudes play a considerable rôle in the present-day life of the world, but holds them to be dangerous unless they are reciprocal.

Reprisals are the subject of a course by Professor Yves de la Brière, covering both the doctrine and the practice in time of peace and war. The central theme is that reprisals should now disappear.

An instructive course on the subject of international arbitration in matters of Private Law is given by Professor Rundstein. It is a difficult subject and one of which the complications only come to the front when one considers in detail such problems as what law the tribunal is to apply and whether the individual is to have a right of access irrespective of action taken by the state to which he belongs.

A course on the interpretation of treaties by Professor Ehrlich of Lwow is well worth reading, particularly the section dealing with the extent to which the intentions of the parties to the treaty may be deduced from material other than the text of the treaty itself.

The volumes contain several other courses worthy of study, and as a whole the lectures of 1928 certainly maintain, even if they do not excel, the high standard of previous years. The volumes are well printed on good paper, and each of them is provided with a good index. C.

Académie de Droit International, Recueil des Cours, Tables Quinquennales, 1923–7. 1 vol. viii+623 pp. Librairie Hachette, 79, Boulevard Saint-Germain, Paris.

This volume contains an analytical index of the contents of the lectures delivered under the auspices of the Academy of International Law at The Hague so far as they have been published in the *Recueils* of the years 1923–7. Some of the courses—twenty-six in all—were not published in the *Recueil*, but of these a list is given in the volume, with information as to where the text of the lectures can be found, if they have been published elsewhere. Ninety-two courses have been published in the twenty volumes covering the years 1923–7, and this index volume contains a full index, extending to 364 pages, of the contents of the courses, together with a second index, extending to 220 pages, of all persons, such as authors or judges, cited in the lectures. The indexing work is well done and the volume should be of great help to those who want to look up the text or study the contents of any lectures published in the *Recueil* which were delivered before 1928.

C.

The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries. By E. R. Adair, Associate Professor of History, McGill University. London: Longmans, Green & Co. xii+282 pp. (21*s.* net.)

A valuable and instructive book, instructive not only for the matter it contains, but for the lesson that it teaches to all intending authors of text-books on international law, of the importance of studying the historical precedents. The following sentence in the Introduction to the book gives the keynote to the work: "The general indifference to early case law which international lawyers have hitherto displayed . . . is especially marked in their treatment of . . . the problem of the position of ambassadors in foreign countries and especially that part of it which has been called the fiction of exterritoriality. A few outstanding cases are always quoted, but the mass of minor cases which exist not only for England, but for nearly every country in Western Europe, have been almost entirely unquoted." Would that every author of a treatise on international law followed the plan which the author has adopted, and based his conclusions on the actual practice of states and not on general principles and *a priori* reasoning!

After a useful introduction, successive chapters of the book deal with the immunity of the ambassador from criminal and from civil jurisdiction, both from the point of view of theory and of practice; the chapters on the theory consisting of a critical examination of the writings of contemporary authors, and those on the practice giving the story in detail of the numerous incidents that arose. Most of the precedents quoted are English precedents, the material being obtained from the published archives of the Record Office or the British Museum, such as the Calendars of State Papers, or the Cotton manuscripts. Then follow chapters dealing with the immunity of the ambassador's suite, the jurisdiction which ambassadors were entitled to exercise over the members of their suites and over their couriers, the freedom of worship to which ambassadors were entitled, the inviolability of their residence, and the means by which their immunities could be enforced.

The book is full of entertaining reading. Ambassadors and their privileges must often have been a grievous burden to the local inhabitants, and many a time their unpopularity was shown by the readiness with which mobs collected, intent on doing violence to the sacred person of the ambassador. It was always to the state authority that the ambassador had to appeal on these occasions. If Laurent had been aware of all the incidents of which the story is told in Mr. Adair's volume, he would have had material at his hand which would have justified some of the violent diatribes which he penned against the whole system of diplomatic immunities. Perhaps the most striking point that emerges is the fact that, in order to ensure respect in the courts of justice for the ambassador's privileges, prerogative action was necessary. The ordinary law of the land did not recognize the special position of an ambassador; the courts had to be restrained by royal order from administering the law to the ambassador's detriment. But if the royal authority was used to protect the ambassador against the subject, it was also used to protect the subject against the ambassador. Just as a Minister for Foreign Affairs, or a Secretary of State, may to-day have to remonstrate with the head of a diplomatic mission who fails to meet the claims of his creditors, so in the sixteenth century the Privy Council, as the embodiment of the Royal authority, was the protector of the interests of the subject; it was through the Council that the discreet creditor of a defaulting, and perhaps impecunious, ambassador could secure redress.

The concluding chapter of the book is full of weighty observations. It contains the author's general appreciation of the writers of the sixteenth and seventeenth centuries, and his criticism of the hostility shown by modern publicists to the existence of diplomatic immunities. The conclusion which the author himself reaches is that the doctrine of exterritoriality, which was the source of the immunities which the ambassador enjoyed, was the unconscious response to the difficulties which beset international relations, and is essential to their maintenance to-day. "If it is true to say that peaceful and intelligent diplomatic intercourse lies at the root of almost all progress in international law, it is surely not unfair to see in the doctrine of exterritoriality the one vital factor that made such progress possible during the sixteenth and seventeenth centuries." C.

The Position of Foreign States before Belgian, French, and German Courts. By Eleanor Wyllis Allen. 1928 and 1929. New York: The Macmillan Company. (Three separate pamphlets.)

These are three separate chapters prepared under the auspices of the Bureau of International Research of Harvard University and Ratcliffe College. When completed, these and other chapters dealing with other countries are to be combined to form a general treatise on the subject. We await the publication of the volume with interest as Miss Allen has, in the three chapters already published, produced a piece of work of real value to the student of International and Comparative Law. A. P. H.

Annual Digest of Public International Law Cases. 1925 and 1926. Editors: Arnold D. McNair and H. Lauterpacht. London: Longmans, Green & Co., 1299. xlv+497 pp. (35*s.*)

It is hardly possible to exaggerate the importance of the series inaugurated by this volume or to welcome its appearance too warmly. A work of this kind goes far to remove the reproach sometimes made against English lawyers, that they are indifferent to the study of international law, and do not contribute to its literature on a scale worthy of the place held by English law among the legal systems of the world.

The book contains 371 digests of decisions, covering 346 distinct cases adjudicated upon during the two years in question. Of these cases, eight are decisions of the Permanent Court of International Justice, sixty-nine of other international tribunals, and 239 of municipal courts in various countries, including most of the European states, North and South America, China and Japan.

The Editors are assisted by a strong advisory committee, and by contributors drawn from all over the world, among whom are to be found many distinguished jurists. It can be safely assumed, therefore, that as regards the decisions of international tribunals the Digest is complete and exhaustive, and as regards national courts that few, if any, cases involving questions of public international law have escaped notice and inclusion. This, so far as I know, is the first attempt anywhere made to form a comprehensive collection of public international law cases covering the fields both of international and municipal litigation, and it is precisely this double character which lends special value to the work. The cases are grouped according to their subject-matter and it is thus possible to compare the judgments of municipal courts and the awards of international tribunals on similar points.

For the student of international law and the practitioner in it, the book is, of course, indispensable, but its value extends beyond these classes—lawyers in general practice and all who are interested in jurisprudence will find here instruction and food for thought.

If one were to single out any one feature for special attention it would, I think, be the extraordinary interest of the reports of cases in foreign municipal courts. Valuable as a collection of international awards is, they are, individually, more or less accessible to specialists in international law, but the decisions of foreign courts, with the exception of those of the United States, have been to all intents and purposes unknown, and almost unknowable, to the English lawyer. The opportunity now afforded of studying the working of the foreign judicial mind, often upon problems with which we are familiar in our own courts, opens a field which is both fascinating and exhaustive.

It is, of course, as a contribution to the science of international law that this work must be judged, and enough has been said to indicate its importance from this point of view. The ground covered is extremely wide—almost every topic is touched upon, and here again one is astonished at the number of cases in the national courts of different countries involving a large variety of questions of international law. It is impossible within the limits of this review to enumerate them all, but as illustrations of points of special importance and interest at the present time which are dealt with may be mentioned such subjects as the position of sovereign states and public ships when engaged in trade, the doctrine of *rebus sic stantibus* in treaties, the effect of treaties under municipal law, the nationality of corporations, the effect of war on contracts, the application of the American liquor laws, and of the laws of Soviet Russia. Speaking broadly, and subject to certain notable exceptions, it is the consistency of the decisions, both national and international, rather than conflicts and contradictions, that impresses one, and this emphasizes the value and assistance that are to be derived from municipal decisions in elucidating the principles of international law. It is unnecessary to elaborate this subject after Dr. Lauterpacht's learned article in the *Year Book* for 1929, but the appearance of the Digest gives additional point to the observations there made.

As the Editors in their Preface modestly invite criticism and suggestions, one or two comments of this nature may be permissible. It might be considered whether the system of headings and cross-headings could not be simplified in future volumes. The classification appears to be somewhat over-elaborate, with the result that it is not always easy for the reader to relate a subheading to the main one. One example of confusion, due presumably to the system adopted, appears at page 352 where the subheading (*c*) is not preceded by an (*a*) or (*b*). Again, the statement of facts and of the decision upon them is sometimes so condensed that it is difficult to follow, and I venture to suggest that, especially in important cases, some expansion would be an improvement. It must be remembered that the full report will, in many cases, be very difficult to obtain, and, even where it could be got, its language will often make it useless. Occasionally notes are appended to a decision which would seem to be extracts from, or summaries of, the actual terms of the judgment, but this is not stated to be so, and it is not clear what the note represents. Instances of this are Cases 127, 128, 144, 145, 146.

Mistakes and misprints are remarkably few. At page 40 there is a reference to N.R.G. which is not included in the list of Abbreviations; at page 220, Case 160, "the United States" is evidently a misprint for "Mexico"; at page 349 Mr. Cooke, the President of the Dawes Interpretative Tribunal, is described as if he were the sole arbitrator.

The Index is good, but might be even fuller—in a work of this kind an exhaustive system of references is of cardinal importance.

The Editors propose to complete and continue this work by further volumes covering the years 1919 to 1924, and 1927 onwards. The task is a heavy one, but in undertaking it they have laid us all under a heavy debt of gratitude, and they deserve not only congratulations on what they have already achieved, but all possible support and assistance in their future labours. A. P. F.

Principes de droit international privé. By E. Bartin. 1930. Paris: "Éditions Domat-Montchrestien." 8vo. 634 pp. (65 fr.)

Professor Bartin has hitherto been known as a distinguished authority on French Civil Law, and as the editor—and part author—of Aubrey and Rau's leading text-book on that subject. His incursion, therefore, into the field of private international law must be looked upon as a novel experiment and, at the same time, a most successful one. Without entering into any academical digressions, as is usually the tendency in continental treatises, Professor Bartin goes straight to the practical aspects of the various issues discussed in this first volume of his book, and invariably supports his conclusions by reference to decided cases. His examination of French case law is thorough and up to date, and he never hesitates to criticize any judgment which appears to him to be either wrong in principle or contradictory in its terms. On the question of the international effect of foreign judgments, the author points out how misleading the interpretation placed on the words "ordre public" may at times prove. Thus, while the French courts have always proclaimed the rule that foreign judgments contrary to French public policy are not enforceable in France, they seem to be disinclined to apply this principle in matters of legitimacy and divorce on grounds which do not appear to be either logical or consistent with the legal meaning of the term "ordre public".

In his discussion of the doctrine of *renvoi*, Professor Bartin shows how this doctrine has not only established an extraterritorial jurisdiction in favour of foreigners, but has also been responsible for many contradictory judgments by the French tribunals. A similar divergency in judicial views prevails at the present moment in this country in view of the conflicting judgment of Mr. Justice Russell (as he then was) in *In Re Annesley* [1926], 1 Ch. 692, and that of Mr. Justice Luxmoore in *In Re Ross, Ross* v. *Waterfield* (1929) [46 T.L. R. 61]. Such a conflict appears to be inevitable so long as there are two divergent tests governing personal status, that of domicil in Anglo-American countries and that of nationality in continental countries.

On the subject of the international validity of Soviet legislation, Professor Bartin fully approves the judgments of the French courts, which refuse to recognize transfers of ownership based on the rule of the abolition of private property, on the ground that such a rule has no legal standing in French law. These judgments may be compared with the decision of Mr. Justice Hill, who, in a very recent case, held that a Soviet marriage could not be recognized in this country as a valid marriage.[1]

Professor Bartin has succeeded in giving us an authoritative and practical treatise on private international law as applied in France, and the second volume of his book, which he promises to have ready for publication by next year, will be awaited with much interest. C. J. Colombos.

La Tutela Giuridica Degli Interessi Internazionali. By Carlo Cereti. Milan: Società Editrice Vita e Pensiero.

For those for whom the words "positive law", "subjective law", and "objective law" have no terrors, this essay makes interesting reading. The author deplores the fact that the only parts of international law which are on a sound "juridical" basis are comparatively trivial and that the things that really matter, such as the employment of force, have yet to be regulated.

The historico-economic parts of this thesis are sound enough, but although the author points out that the judge is the son of discord and the father of concord and that arbitration is an earlier and more primitive institution than adjudication, he does not work out the consequences of this, viz.: that we must wait for a superstate before we can have adjudication in the strict sense of the term; though he does seem in one place to envisage the superstate.

The trouble about probing into these matters in this analytical way is that one runs the risk of finding Austin justified when he says that the "so-called law of nations" is not law at all; and since we do not wish to prove the non-existence of our subject-matter, it does seem that the analytical method can be carried too far in international law. By all means distinguish, as Austin insisted we must distinguish, between what the practice of nations is and what the practice of nations perhaps ought to be: but this is as far as we can safely go. The moment we begin to employ the word *juridical*, we think of courts whose judgments can be enforced, whose jurisdiction is compulsory, and whose decisions have, or ought to have, nothing to do with political expediency.

Once admitted, however, the appropriateness of the term "juridical" in international law and the distinction the author draws between juridical and non-juridical zones (which latter he would like to see extended) the argument flows smoothly enough. There is no index, but the contents are well analysed at the beginning, references being to page and section. A thoughtful piece of work of the philosophico-idealistic school. Temple Grey.

The League Council in Action. A study of the methods employed by the Council of the League of Nations to prevent war and to settle international disputes. By T. P. Conwell-Evans. 1929. London: Oxford University Press. xii+291 pp. (12*s.* 6*d.*)

This is a very useful book, and in it the author has broken new ground. The League of Nations has now been at work for ten years, the Council has held (at the date of writing this review) fifty-eight sessions. It has been called upon to deal with a great variety of disputable matters between states, and to interpret various articles of the Covenant. Mr. Conwell-Evans has examined no less than twenty-three international disputes which have come before the Council. The result of this analysis is a growing jurisprudence based on the principles which the author groups under the name of "League mediation".

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[1] The decision has since been reversed by C.A. (46 T.L.R. 444). [Ed.]

The author first discusses the jurisdiction of the Council and its powers to require the observance of the obligations of the Covenant not to resort to war. He then considers cases of intervention by the President of the Council, meetings of the Council to restore peace, and Peace Commissions. The last part deals with disputes likely to lead to a rupture, and the work of the Council as a Conciliation Commission.

The Council has not been uniformly successful, and its management of the dispute between Albania and Yugo-Slavia in 1921 was lacking both in adroitness and directness. It had learned better when the dispute between Greece and Bulgaria came before it in 1925, and its rapid intervention was at once effective. Whether a like success would have crowned its efforts had the Powers been two Great Powers is a question which cannot be answered. Mr. Conwell-Evans discusses the Corfu incident in 1923, when a Great Power was concerned and the Council ultimately endorsed Italy's heavy claims on Greece. He points out that the Council, by its collective silence in the face of Italy's "act of war", and by its failure to express its disapproval in view of a Member's obligations under Article 12 not to resort to war, temporarily weakened confidence in the League as an instrument of peace and shook the sense of security. A useful discussion follows on the Report of the Committee of Jurists in regard to whether coercive measures, which are not intended to constitute acts of war, may or may not be consistent with the provisions of Articles 12–15 of the Covenant, which brings out the different views which have been expressed regarding its ambiguous implications. The author concludes by expressing the opinion that emphasis on sanctions by the League should be avoided. In his view the road to success lies in the development of the means of prevention of war, in other words, in developing and organizing peace. It is because of the Council's work as guardian of the peace and as conciliator, that he has good hopes for the future of the League.

A. PEARCE HIGGINS.

Transactions of the Grotius Society, Volume XIV. Papers read before the Society in the year 1928. London: Sweet & Maxwell. 174 pp. (*7s. 6d.*)

The Grotius Society has recently lost both its President, Lord Phillimore, and its Honorary Secretary, Dr. Bellot, and this volume begins with tributes to the memory of both these distinguished and devoted officers of the Society.

Six papers read to the Society in the current year are here reproduced:

(1) The Monroe Doctrine by Arthur Barratt, K.C.; (2) Arbitral Awards in France and Belgium by R. J. B. Anderson (a useful and concise explanation of the law of these countries in a matter which is of considerable practical interest to English lawyers and business men); (3) Territorial Waters and International Legislation by W. E. Masterson (this paper is based on a summary of the Liquor Treaties concluded by the United States and the preparatory work for the conference convoked by the League of Nations for the codification of International Law); (4) An International Criminal Court by Judge M. A. Caloyanni; (5) The Paris (Kellogg) Pact by Dr. C. J. Colombos; (6) A Draft General Extradition Convention by F. T. Grey; (7) The Constitutional History of Egypt for the last Forty Years by Sir Maurice Amos.

A most interesting feature in this number is the publication of a report on the "Legal Status of Submarines in War" drawn up as long ago as 1917 by six members of the society (including the late Sir Erle Richards and Dr. Bellot) and presented to the Government. Its publication was then withheld for reasons of state, and now takes place by the consent of the Attorney General, by a curious coincidence in the same year as the signature of the London Naval Treaty, containing some memorable provisions on this subject. E.

Le Droit du Danube International. Par Henri Hajnal. The Hague: Martinus Nijhoff. 324 pp. (fl. 9.)

From some points of view the Danube is, perhaps, the most international river in the world. It traverses and gives access to the sea to a very large number of different states and, next to the Rhine, has been the subject of the greatest number of international negotiations, treaties, regulations, and, it must be added, disputes. This large monograph in French by a Hungarian jurist, Dr. Hajnal, contains a very full history of the successive attempts at the internationalization of the Danube, which began in earnest at the Conference of Paris in 1856, and from that date down to the present day have continued constantly to occupy the attentions of many foreign ministries of Europe. The author has collected together in a convenient form a very large amount of useful material and information. The volume, which is obviously the result of a great deal of research, will be of considerable value to any person who, for any reason, desires to investigate fully this subject. E.

The Australian Constitution: its Interpretation and Amendment. By the Hon. W. A. Holman, K.C. Sydney: Printers Ltd.

This book is made up of three lectures delivered in the University of Queensland on the John Murtagh Macrossan Foundation by a former Premier of New South Wales in 1928. The first two lectures are devoted to a description of the very curious vicissitudes through which the interpretation of the Australian Constitution has passed at the hands of the High Court. The earlier decisions, which had adopted and applied the American constitutional doctrines of the immunity of governmental "instrumentalities" and of the "reserved powers" of the States, have been boldly departed from in a series of more recent cases following on the *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.*, with the result, in Mr. Holman's opinion, that the equilibrium between States and Commonwealth, which was probably intended by the authors of the Constitution and seemed at any rate to have been definitely established, has now been overthrown. The part played in this reversal by the unforeseen development of the jurisdiction of the Federal Industrial Arbitration Court is dealt with in the second lecture; an extremely curious chapter of legal history, leading to a result so bizarre that a country which is able to conduct its affairs under a unitary constitution may well congratulate itself on its good fortune. In the third lecture Mr. Holman adumbrates a number of amendments of the Constitution which seem to him to be necessary. He rejects unification, for reasons which, at this distance at any rate, seem to be decisive, and suggests a less drastic revision, having for its object the restoration of the States to their rightful position in the Australian polity. It is interesting to observe that the author favours the restoration of the right of appeal to the Privy Council in constitutional matters, though he is severely critical of its incursions into that sphere in the past.

The intrinsic interest of the subject-matter of these lectures and the remarkably clear style in which the author has set forth a very tangled legal story, deserve a wider public than is likely to be reached by the book in its present rather unattractive format. J. L. B.

Cases and other materials on International Law. Edited by Manley O. Hudson 1929. St. Paul: West Publishing Co. xxxv+1538 pp. ($6.50.)

A Selection of Cases and other Readings on the Law of Nations chiefly as it is interpreted by British and American Courts. By Edwin De Witt Dickinson. 1929. New York: McGraw-Hill Book Co. xxii+1133 pp.

The production of "source books" on various branches of law is especially associated with the case-law method of teaching in the Law Schools of the United States. The two weighty books above mentioned are examples of such work. In 1893 a comparatively small but valuable collection of Leading Cases was issued by the late Freeman Snow. This was followed by a new and enlarged edition of the work by Dr. James Brown Scott in 1902, which was found by students in England to be of great assistance in their studies. In 1922 Dr. Scott issued another edition including cases of importance since the previous issue. Professor Manley Hudson of Harvard has been accorded permission to utilize the materials in Dr. Scott's book, in which he has found it necessary to make certain changes in the arrangement of topics, and to reduce considerably the portion relating to War and Neutrality. He points out that in no decade has so much new material been provided for students of International Law as in that which followed the end of the World War. This is reflected in the book, where numerous cases decided by the Permanent Court of International Justice, and Awards of various Arbitral Commissions will be found.

The work of Professor Dickinson of the University of Michigan departs in certain respects from the earlier case-books. It does not purport to cover the whole subject, and in particular the author excludes most of the relations of war, much of the relations of neutrality, and such of the relations of peace as are still governed by essentially political standards. In his selection of cases he has also been guided by pedagogic rather than by systematic considerations, and some of the well-known cases are excluded in favour of a relatively unknown case which challenges the attention of the student to an important problem. Not only does he include cases and extracts from treaties, but also excerpts from writers of authority. Thus, the opening pages give passages from the writings of Lord Bryce, Grotius, Sir Frederick Pollock, Professor Dickinson's well-known work on the Equality of States, Pufendorf, Burlamaqui, Zouche, Wildman, Vattel, and Blackstone. This method of quotation from writers is continued throughout the various sections of the work.

Professor Dickinson, in his Preface, makes the statement on which it would seem that the system of case-law teaching is largely based, namely that students derive a more thorough understanding of the subject and a keener zest for further acquisition from a relatively more intensive study of a few fundamental topics. This is not a view which would meet with unanimous acceptance in England, where the time allocated to legal studies in the Universities is generally less than in the United States Law Schools. But all students of International Law will find in both of these collections a great storehouse of learning, and invaluable works of reference. A. P. H.

The International Law Association, Report of the 35th Conference (*Warsaw*, 1928). London: Sweet & Maxwell. 487 pp. (£2.)

The International Law Association includes within its scope practically any branch of law which is of international interest and a possible subject of regulation by international convention. It is not surprising, therefore, to find on the agenda of its conference at Warsaw subjects which are not ordinarily considered to belong to the sphere of Public or Private International Law, such as C.I.F. contracts, trade marks, the effect of war on contracts, commercial arbitration, and bankruptcy. This volume also, however, contains records of discussion on the laws of war in occupied territory, maritime neutrality, and extradition.

The volume affords ample evidence that the Association is continuing its useful work in bringing representatives of different schools of law and thought into contact and forming a *communis opinio* on matters of general interest. E.

DOMINION STATUS.

The Sovereignty of the Dominions. By A. Berriedale Keith. 1929. Macmillan's. xxvi+524 pp. (18*s.*)

The Juridical Status of the British Dominions. By P. J. Noel Baker. 1929. Longmans, Green & Co. xii+421 pp. (21*s.*)

The Dominions and Diplomacy. By A. Gordon Dewey. 1929. Longmans, Green & Co. 2 vols. xv+375, and 397 pp. (45*s.*)

The King's Republics. By H. J. Schlossberg. 1929. Stevens & Sons. xx+147 pp.

Those of us who have occasion to spend some time in studying the records of large international conferences must sometimes be tempted to the reflection that the price to be paid for unanimity in political pronouncements is usually either platitude or ambiguity. This would also appear to be true of the periodical meetings of the Imperial Conference, since these have now acquired a semi-international character. The task of issuing a grand pronouncement upon the constitutional relations of the Empire was ordained at the Conference of 1917 and continued to perplex statesmen for the next nine years. It was successfully evaded in 1921 and again in 1923, and clearly something had to be done in 1926. The South African Government in particular was insistent upon the need for definite action. But unanimity was the first essential. Above all things it was necessary to avoid the danger of majority and minority reports, and the problem of drafting a formula which should be equally acceptable to all the delegates was certainly not an easy one. Perhaps it was not wholly by accident that the task was entrusted to a statesman with the theological experience of the late Lord Balfour. Even the lapse of a few years has been sufficient to show that the history of the Conference Report of 1926 is likely to resemble that of the Thirty-Nine Articles, which were enacted "for the avoiding of diversities of opinion and for the establishing of consent touching true religion". For more than three centuries they have now impartially furnished munitions to every belligerent group, and it seems clear that the Report is going to perform the same service. Indeed the four books now under review recall a paragraph from King James's Preface to the Articles:

> "For the present, though some differences have been ill raised, yet We take comfort in this, that all Clergymen within Our Realm have always most willingly subscribed to the Articles established; which is an argument to Us, that they all agree in the true, usual, literal meaning of the said Articles; and that even in those curious points, in which the present differences lie, men of all sorts take the Articles of the Church of England to be for them; which is an argument again, that none of them intend any desertion of the Articles established."

Perhaps we too may "take comfort in this", when we study the many and various interpretations of the Report of 1926. It has proved to be a mirror in which each commentator sees the reflection of his own opinions. All alike "take it to be for them", and for this reason "none intend any desertion" of the principles which it purports to declare.

Before turning to the volumes under review let us glance at some of the "curious points" in the Report itself. Familiar though we are now with the definition of "equality of status", it may be convenient to recall the exact words:

> "Their position and mutual relation (i.e. Great Britain and the Dominions) may be readily defined. *They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.*"[1]

This is immediately followed by a paragraph which seems to breathe something of the old Blackstonian spirit:

> "A foreigner endeavouring to understand the true character of the British Empire by the aid of this formula alone would be tempted to think that it was devised rather to make mutual interference impossible than to make mutual co-operation easy."

He would indeed. Unfortunately the books before us, and a mass of other writings and speeches, show only too abundantly that it is not only the "foreigner" who is somewhat bewildered. The privilege of British nationality is evidently insufficient as an initiation into the secret of our constitutional mysteries. So the celebrated formula is hardly uttered before we are warned not to take it too literally. A few lines farther down we are told that it is only intended to describe "the negative relations in which Great Britain and the Dominions stand to each other". For this reason it can only serve to "express a portion of the truth", since "the British Empire is not founded upon negations".

The transition from the negative to the positive is effected with the greatest delicacy. Unanimity is ensured by briefly setting forth the ideals and objects of the Empire in terms which would be equally applicable to the Kingdom of Heaven, and "equality of status" is once more declared to be "the root principle governing our Inter-Imperial relations". But when we come to grapple with positive problems, when we come to discuss how the actual work is to be done, then it seems that the doctrine of equality must be gently pushed into the background. So in the next sentence the Report goes on:

> "But the principles of equality and similarity, appropriate to *status*, do not universally extend to function. Here we require something more than immutable dogmas. For example, to deal with questions of diplomacy and questions of defence, we require also flexible machinery—machinery which can, from time to time, be adapted to the

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[1] The italics are in the original text.

> changing circumstances of the world. This subject also has occupied our attention. The rest of this report will show how we have endeavoured not only to state political theory, but to apply it to our common needs."

These extracts are sufficient to indicate the real line of division between the two main groups of commentators upon the 1926 Report. They may be divided into those who emphasize equality of status and those who emphasize dissimilarity of function. Nor is the difference limited to the interpretation of a particular text. It was well established before 1926, and it also serves to distinguish the two chief points of view from which political writers have examined the events of the last twenty years. Indeed the Report itself did not purport to make or recommend any substantial change in inter-Imperial relations. Its function was rather to arrive at an agreed statement of the position which had already been reached by the gradual development of practice. By very skilful draftsmanship both points of view were enabled to find expression in the final text, and future practice was left free to develop along such lines as experience might suggest. Unquestionably this was the right policy to adopt. The Imperial Conference had no real authority to pronounce a conclusive judgment upon controversial questions, and any attempt to do so would have been tantamount to drawing up a written constitution for the Empire. For this the time has not yet come, and any such function is expressly disclaimed in the opening paragraphs of the Report. Further experience is still necessary in order to indicate the best solution of unsettled problems, and a settlement is more likely to be permanent if it rests upon the results of experience than if it is prematurely determined by an *ex cathedra* pronouncement.

Of the authors whose books we are now considering it may be said at once that Mr. Baker and Mr. Schlossberg emphasize equality of status, while Professor Keith rather lays stress upon dissimilarity of function. As Lord Balfour himself pointed out at Edinburgh, the second proposition is just as important as the first, and failure to realize this undoubtedly disturbs the balance of Mr. Baker's and Mr. Schlossberg's analysis. Each of these latter authors discusses the doctrine of equality as if it was a single all-controlling principle. The text of the Report itself makes it clear that the doctrine of equality is only intended to describe "the negative relations in which Great Britain and the Dominions stand to each other", but both these learned authors seem to argue upon the assumption that it is a positive rule of action. Thus Mr. Baker says (p. 141):

> "It is this 'root principle' of equality of status that governs all the terms of the Report, and it is with that principle continually in mind that its succeeding sections must be discussed."

Mr. Schlossberg is even more explicit (p. 26):

> "Neither Great Britain nor any of the Dominions knows any authority over itself except its own free national will. The degree and nature of Dominion status is equal to that of Britain without any inferiority or reservation. Whatever, therefore, may be the nature or the degree of liberty or independence enjoyed by Great Britain, the same will have to apply to the Dominion."

In another passage he says (p. 54):

> "The Britannic Alliance has no personality, can own no property except as a partnership, has no corporate conscience, cannot sue or be sued, and has only a common will when acting together after consultation and agreement in a definite transaction. It is merely a name indicating, not a body corporate like the League, nor a Confederation

> like the United States of America, nor a Union like the Union of Soviet Republics, but an association of States free to agree whether or not they will act in a particular transaction in a particular manner for a particular purpose."

Except for the fact that the full text of the Report is printed in an appendix to each book, neither of these authors quotes or discusses the vital passage which lays down that "the principles of equality and similarity, appropriate to *status*, do not universally extend to function". On the other hand, Professor Keith, following Lord Balfour himself, rightly insists (p. 184) that

> "The Report equally rests on both assertions, and, in fact, it is merely due to the second that it can be made to harmonize with the facts of the present Constitution. The essential position is that, under the mode in which the Empire functions, the autonomy of the Dominions, wide and important as it is, is subject to certain definite limitations. When the framers of the Report passed from the general aspect of the question, they were at once confronted by the formidable difficulties involved in seeking to apply their conception to concrete situations, and the substance of the Report, when it leaves the field of first principles, amounts in effect to a confession that the application of the doctrines thus enunciated must be the work of the future."

The limits of a review do not permit a detailed analysis of the arguments advanced by any of these three authors, but the passages cited may perhaps suffice to indicate the general attitude of each. Naturally these different points of view result in divergent answers to practical questions, and some of these may be briefly noticed.

For example, what is meant by the "British Empire"? To Mr. Schlossberg, as we have seen in the passage already cited, "it is merely a name" and he prefers to call it "the Britannic Alliance", Mr. Baker's closer analysis of practice leads him to approach the problem with more caution. In his view, the British Empire, as such, is not a Member of the League. "The British Commonwealth of Nations is not the same thing as the British Empire. It is something narrower. It is restricted to the truly self-governing units of the Empire which are represented in the Imperial Conference" (p. 359). On the other hand, "it may conceivably happen that in some matters of treaty-making the British Empire may act as a unit" (p. 367). So the question does not really admit of a categorical answer.

> "It may therefore be concluded, not very satisfactorily, that the British Empire is still not only a political unit in the world of States, but also for certain purposes a single unified person of International Law. What these purposes may include will depend upon the will of the Governments of the Members of the British Commonwealth, and only time and practice can decide what their scope will be" (p. 368).

Professor Keith remarks that terminology has become somewhat confused in practice, but he has the authority of Parliament behind him when he points out (p. 196) that

> "The effort to distinguish the British Commonwealth from the Empire and to deny that the Dominions form part of the Empire contradicts Article 1 of the Irish treaty."

These differences of opinion are not merely verbal. They become of real practical importance when the question of the treaty-making power is under discussion.

Of still greater importance is the question of neutrality in time of war. Professor Keith adheres to the view expressed in his earlier writings, that the Empire can only be at peace or at war as a single unit. Mr. Baker agrees with him, in so far as the matter rests upon existing law, but suggests that it might be possible to alter our constitutional law so as to allow the Dominions to be neutral when Great Britain is at war. Mr. Schlossberg again commits himself to the extreme autonomist view, which has found some support in South Africa, and maintains that each Dominion has the absolute right to remain neutral, and even to declare war upon its own initiative. In this Mr. Schlossberg is more logical than Mr. Baker, since the right which he claims follows inevitably from an unreserved acceptance of the principle of "equality of status" as a universal rule. The truth is that this is one of the cases where the principle of dissimilarity of function becomes of fundamental importance. Both law and usage make it abundantly clear that the responsibility for deciding questions of peace and war is a "function" reserved to the Government of the United Kingdom. No doubt the alteration of this rule, as Mr. Baker suggests, is theoretically possible, but only in the same sense that the disintegration of the Empire is also possible. The two things are in effect the same. To Mr. Schlossberg, who will not admit any organic unity other than allegiance to the common Crown, the alteration appears to have already taken place. In his opinion there is no function of the British Government which is not shared on equal terms by the Government of each Dominion, and the unqualified acceptance of this principle compels him to insist upon the independent right of the Dominions to declare war and peace. In the absence of such a right "the whole theory of Dominion independence is a delusion" (p. 45). He finds historical precedent for this doctrine in the example of the Anglo-Hanoverian monarchy, and an incautious remark of Mr. Amery, which he cites no less than four times, furnishes more modern authority.[1] From his point of view the question of the right to secede from the Empire therefore ceases to have any practical importance.

> "It was thought that a Dominion could become sovereign and independent only by seceding from the Empire. But the position as it now stands is that the Dominions are sovereign and independent without seceding from the Empire. They may exercise every function, national and international, of a sovereign state. But, being Monarchical States, that is Kingdoms, they have no constitutional right to abolish that which is inherent in them as Monarchical States, namely, the Kingship. To do this would be an illegal act. Therefore, from every point of legal authority, the Dominions have no constitutional right of secession from the Empire, that is, they have no right to abolish the Kingship and thus put an end to the sole legal bond which alone makes them part of the Empire. Thus is the King the Empire's cement" (p. 43).

In principle there seems to be no reason why a fully sovereign state should not be free to change its form of government from a monarchy to a republic, but the point is of little immediate interest, and we need not complain if Mr. Schlossberg's strong sense of personal loyalty has deflected the strict logic of his argument.

These divergences of doctrine lead the learned authors to widely varying conclusions upon almost every subject which they discuss, but the limits of a review preclude any closer analysis. Lest the quotations given should create a false impression of Mr. Schlossberg's views it should be clearly stated that he is a convinced believer in the unity of the Empire, and regards the maintenance of this unity as essential to the peace of the world. Even his vigorous assertion of the right of separate neutrality is qualified in another passage by the very true remark (p. 105) that "it is impossible to contemplate the neutrality of a Britannic State in a dangerous war in which other Britannic States were involved". Upon the practical value of unity all three authors are indeed agreed, and they are further agreed in urging that the preservation of this unity will be achieved "not by legal or constitutional restrictions, but only by voluntary co-operation in unrestricted freedom" (Baker, p. 372). The real difference between them comes to this, that Professor Keith insists upon the practical utility of the powers still legally reserved to the central authority, while Mr. Baker and Mr. Schlossberg are disposed to regard them as mere fictions, surviving without any real vitality from an age that has passed away.

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[1] "Every Government of the Empire, if it so wish, is entitled to exercise every function of national and international right" (House of Commons, June 29, 1927). Upon this Professor Keith remarks (p. 468) that "a casual expression of the opinion of one Minister cannot alter the Constitution of the Empire or the principles of international law."

Dr. Dewey's book needs to be separately noticed, since he is not primarily interested in the problems of constitutional and international law which chiefly occupy the attention of the other three authors. He approaches his subject from the point of view of the historian, and his object is to trace the course of the main currents of political opinion which have contributed to the development of inter-Imperial practice. In doing this he has rescued from obscurity a great number of political speeches and fugitive writings extending over many years, and the collection of his material must have entailed very laborious research. In the result we have a very complete documentation of the modern development of Imperial relations, and for the most part we are enabled to trace the course of events in the actual words of those who have controlled it. Perhaps Dr. Dewey has been somewhat over-liberal in citation, and more rigorous selection might have enabled him to limit his work to a single volume without sacrificing anything of essential value. It is difficult to revive interest in old political speeches and leading articles, and most readers will find it easier to give their attention to Dr. Dewey's own very able analysis of the gradual development of opinion.

Since the conclusions at which he arrives are political rather than legal, the appreciation of them lies outside the ordinary scope of the *Year Book*, but it may be said that Dr. Dewey is no less convinced than the three legal authors of the value of Imperial unity. He points out that until recently the problem of Empire relations has been mainly internal and constitutional, and he believes that increasing experience of international affairs will have the effect of drawing the members of the Commonwealth into a closer union. A two-volume work cannot easily be summarized, but perhaps the following sentence from the last chapter fairly indicates Dr. Dewey's general position (vol. ii, p. 360):

> "It is the faith of the present writer, at least, that as the Britannic Question loses its inwardness, as the eyes of the Dominions are turned outwards to consider their prospects in relation to foreign Powers, and as the international scene changes, the result will be a growing realization that the similarities immeasurably outweigh the differences, that all the members of the Commonwealth have far more in common with one another than with any other nation, and that this realization will become the paramount factor in determining future relationships."

A general survey of the four books under review leaves one with the impression that by this time there is very little that is new to be said on the subject of Dominion status and inter-Imperial relations. But we may find every reason for satisfaction in the fact that these authors, like nearly all other recent writers on the same topic, have succeeded in maintaining the whole discussion at a very high level. Undoubtedly the present concentration of interest upon the international aspects of the problem has given to the controversy a dignified tone which was often lacking in the days when the debate was essentially domestic. Neither in Great Britain nor in the Dominions do the differences of opinion indicated by these and other books now follow the lines of division between political parties. Nor, again, can we say that there is any longer a British as opposed to a Dominion point of view. The divergences of opinion are essentially individual. Whatever may be the ambiguities of the 1926 Report, and whatever may be its defects as an authoritative formula, the fact that it was signed unanimously is of deep significance. The common signature means that there was agreement upon the fundamental issue of asserting and preserving the unity of the Empire, and in this agreement the publicists, without serious exception, concur. There are real differences both as to the interpretation of existing practice and as to future policy, but there is substantial agreement both upon the actual unity of the Empire and upon the necessity for its maintenance. Towards the solution of these differences there is probably now very little that legal and constitutional argument can contribute. Given good will and common sense, the very absence of a decisive written authority should enable time and experience to do their proper work. H. A. SMITH.

The International Protection of Industrial Property. By Stephen P. Ladas, Harvard University Press, Cambridge, Mass. 1930. xv+972 pp. ($7.50.)

This is the second volume to appear of the Harvard Studies in International Law which are being published under the general editorship of Professor M. O. Hudson: the first of such Studies being a shorter work by the present author on the International Protection of Trade Marks by the American Republics.

The present work is largely a compilation of useful information, carefully made and reasonably arranged. It brings together and digests a series of facts which have not, to my knowledge, been collected before, and in the collection of which considerable labour must have been expended. The book is divided into three parts. The first part deals with such protection of foreigner's industrial property as there was in various countries before the International Union of 1883 under the municipal law of countries or by virtue of bipartite treaties. The second and most important part (pp. 73–806) gives the history and explains the administration of the Union and analyses the present existing rights of industrial property under the general heads of "Patents", "Industrial Designs and Models", "Utility Models", "Trade-marks", &c. The third part deals with the possible future developments of industrial property and has a short account of the recent movement to secure "scientific property". There is a useful bibliography, and the text is fully annotated. The type and lay-out is clear and effective. Mr. Ladas should be congratulated on having brought to a successful conclusion so onerous an undertaking, and on having produced a volume which, though almost encyclopaedic in its content, provides a good conspectus of the present state and of the present difficulties of industrial property on the international scale. C. J. H.

Political Handbook of the World, Parliaments, Parties, and Press. Edited by Walter H. Mallory. Yale University Press, for Council of Foreign Relations, 25 West 43rd Street, New York. 1930. 198 pp. ($2.50.)

The success of the volume with this title published last year has led the Council of Foreign Relations to revise and reissue it annually. It is in every respect a useful work of reference; its purpose can best be described in the words of the Editor: "When a new Ministry is reported from France or Japan, when an important statement is issued by a public leader, when comment on some current international question is quoted in the press from newspapers abroad, a reader often is unable to judge the true significance of such items of news. The Handbook is designed to meet this need for special information." Copies can be obtained from the address given above.

The Working of the Minorities System under the League of Nations. By Joseph S. Rouček, Ph.D. 1929. Prague: Orbis Publishing Co. 222 pp.

This little book was written as the author's thesis for his degree of Doctor of Philosophy at New York University. Although a Czech, Dr. Rouček is free from bias and has approached his task in an objective spirit. Taken as a whole, the work is a useful survey, short but comprehensive, of the system set up at the conclusion of the war for the protection of minorities. It begins with an analysis of the distribution of minorities in post-war Europe, and of the nature of the problem which the Big Five endeavoured to solve at the Paris Conference. The account of the discussions there, and of the resistance of the Powers upon which minorities obligations were being pressed, is particularly interesting. The author proceeds to discuss the legal basis of the Minorities Treaties, and explains the procedure of the Council, and of the Permanent Court of International Justice in minorities questions, and gives details of four selected cases dealt with by the League in the early stages of its work. Much useful information is embraced within a small compass, including a convenient enumeration of the various international instruments giving rise to minorities obligations.

The author tends, I think, to overestimate a little the merits, and underestimate the defects, of the Council's "minorities" procedure. He certainly appears to assume a readiness on the part of the Council to refer legal questions to judicial determination which hardly corresponds to the real facts. But on the whole, his conclusions, both legal and political, are sound and reasonable, and he makes a good point by urging that the treaties should, in the last analysis, be considered rather as an advantage than a burden for the states bound by their provisions. A. F.

Gerichtsbarkeit über fremde Staaten, unter besonderer Berücksichtigung der Entwicklung seit dem Weltkriege. By Dr. Botho Spruth. Leipzig: Universitätsverlag von Robert Noske. 1929. xiv+104 pp. (RM. 5.)

This little book forms the thirteenth volume of the "Frankfurter Abhandlungen" on Modern International Law, of which Professors Giese and Strupp are the general editors. The Editors in a short introduction explain that recent developments have led them to extend the scope of their series beyond the topics of international organization and disarmament and to include the fundamental questions of international law—its sources, its relation to municipal law and to natural law. Dr. Spruth's treatise is the firstfruits of this wider expansion.

The work is divided into five parts. In the first part, entitled "German Law or International Law", the author bases himself on the provisions of Article 4 of the Constitution of Weimar which incorporates in German law "the universally recognized rule of international law". The second part contains a discussion of the question whether, on the subject of jurisdiction over foreign states, there exists such an universally recognized rule of international law; this question, as might have been anticipated, is answered in the negative. The third part briefly examines the question whether there exists any German customary law on the subject. The fourth section—entitled "Jurisdiction and the Sovereignty of States"—is, for a foreign reader, the most interesting part of the book; it includes an acute examination of the relations of the concept of sovereignty to that of jurisdiction in relation—and this is the point of most interest—not only to the state which is asked to submit to jurisdiction but also to the state whose sovereignty is or may be affected by the claim of its brother-state to be immune. The fifth part contains the author's conclusions.

Probably no competent person will dissent from the view of the author that as a matter of justice no countenance ought to be given to the claim of a state, especially when not acting as an organ of authority within the limits of its own power, to be immune from the jurisdiction whether of its own courts or of those of a foreign country, but there will be more hesitation in accepting what is apparently his opinion, that as a matter of international law the wide and general immunity now recognized might be disregarded by an international court. This opinion is based on the generally admitted exceptions (voluntary submission and the field of local land law) to the rule of immunity. It is, to say the least of it, arguable that the English courts took a wrong turning in the case of the *Parlement Belge* (1879, 4 P.D. 129 (1880), 5 P.D. 197), but the Supreme Court of the United States has followed both this example and concordant American precedents. It would need a very strong—and a very cautious—international court to reverse the current and gradually bring states in their non-authoritative activities within the jurisdiction of municipal tribunals. The matter is one in which a deliberate change of the law by international convention is needed; it is disappointing in this respect to find that the proposals of the Brussels Convention of 1926, assimilating to private ships state ships engaged in trade, have not yet been accepted. If on a definite matter of urgent international importance it is not found possible to interest parliamentary attention sufficiently to obtain an obviously reasonable change in the law, what prospect is there of carrying into effect by general parliamentary—and, in particular, senatorial—action, even the most modest proposals of the advocates of the "codification of International Law"?

Dr. Spruth's book may be commended to all who wish to make a closer study of this subject and in particular to see how it has been treated by various learned persons in Germany. For an English reader the book (which has the merit of being printed in Latin characters) would gain in usefulness if in addition to, or perhaps even in place of, the very elaborate bibliography, it included a good subject index and a table of cases.

J. F. W.

Information on the World Court, 1918–28. By J. W. Wheeler-Bennett and Maurice Fanshawe, with an introduction by Sir Cecil Hurst. George Allen & Unwin. 1929. 208 pp.

This volume is issued under the auspices of the Information Service on International Affairs with the purpose of bringing up to date its previous publications on the same subject. The title does not belie the contents, for the book is undoubtedly informative. It contains a quantity of valuable material on many questions of interest in connexion with the Permanent Court of International Justice. Sir Cecil Hurst in his Introduction rightly emphasizes, in vigorous terms, the importance of adequate knowledge of the Court on the part of the general public, for "the day will come when the Court will give some decision which will be very unpopular. . . . If the decision goes against us in some case which has evolved widespread interest and which is felt to touch the interests of the people at a vital spot, there may well be popular clamour, clamour which will become dangerous unless well-informed opinion knows enough about the Court . . . to keep it from thinking that the Court was necessarily in the wrong because it decided against us"—observations which are more than ever cogent now that our binding acceptance of the Optional Clause has become an accomplished fact.

The authors begin with an interesting and able description of the origin of the Court, including an account of the drafting of Article 14 of the Covenant, and of the Statute. In touching upon the alterations which it is now proposed to introduce, however, they seem to suggest (p. 38) that these include an amendment of the existing rule whereby judges elected to fill a casual vacancy hold office only for the remainder of their predecessors' term. The Revision Protocol does not alter this system.

Chapter III consists of parallel columns containing the Statute and the original Draft Scheme of the Committee of Jurists, showing by means of italics where the two differ. In Chapter IV the history and present scope of the Court's jurisdiction are outlined. The election of the existing members of the Court is described in Chapter V, and then follows a section devoted to the judgments and advisory opinions. This is the least satisfactory feature of the book. The account given of the various cases is often inadequate, and their relative importance is not sufficiently brought home. Thus e.g. the *Tunis* and *Morocco* case and the *Mosul* case (which are, with the *Lotus* case, probably the most important so far dealt with by the Court) are briefly reported, whereas the case relating to the jurisdiction of the European Commission of the Danube is singled out as being of particular importance and given a fairly full report.

Chapter VIII contains a useful survey of the position of the United States *vis-à-vis* the Court.

There are an unusually large number of misprints, one or two of which are serious because they lead to errors in meaning. Thus on page 85 the omission of a full stop results in a misstatement as to the effect of Article 31 of the Statute, and on page 92 the position of the foot-note and the words "the declaration in question" give rise to a confusing mistake.

There is much valuable material in the Appendices, including the Revised Rules of Court.

A. P. F.

Chapters on Current International Law and the League of Nations. By Sir John Fischer Williams, K.C., C.B.E. London: Longmans, Green & Co., Ltd. 500 pp. (25*s.*)

In collecting, amplifying, and re-editing lectures, papers, and articles written by him in the last six years and adding to them three entirely new articles, Sir John Fischer Williams has given us in this volume an extremely useful and thoughtful contribution to the literature of international law. Of the fifteen chapters of this book, three consist in reprints, with slight additions, of articles which have appeared in previous numbers of the *Year Book* under the titles "Denationalization", "International Law and the Property of Aliens", and "Sovereignty, Seisin and the League", and to them readers of the *Year Book* require no further introduction. The other chapters do not fall behind them in quality. In two long chapters, covering together some 120 pages, the author treats of a subject for which, as British Legal Representative on the Reparation Commission, he has very special qualifications. In the first, under the title "Some Legal Aspects of International Financial Problems", he treats separately and fully the questions of "Debts of States to Foreign Individuals", and "Debts of States to States", and in the second chapter he deals with the "Financial Administration of the League" in connexion with Austria, Hungary, Greece, and Bulgaria. These articles are particularly valuable as there does not exist—at any rate in English—any other full and competent treatment of these subjects from the legal point of view.

Amongst the other articles that on "The League of Nations and Unanimity" (the question when the unanimous assent of all representatives is required for action by the Council and Assembly of the League respectively) is especially to be commended as a very penetrating treatment of a highly important subject, not merely from the analytical, but also from (if the expression may be permitted) the organic point of view. Another chapter—"The status of the League of Nations in International Law"—deals with a favourite subject of international jurists, and arrives at a conclusion upon the question of the "personality" of the League of Nations upon reasoning which is very convincing.

In the first three chapters on "The Nature and Binding Force of International Law", "The Place of Law in International Affairs", and "The New International Law", Sir John reveals his general attitude to his subject—which is that of a sane and measured optimism. These chapters contain, moreover, many thoughtful observations upon points of detail, such as the important Article 36 of the Statute of the Permanent Court.

Of the entirely new matter, the most interesting chapter is that entitled "International Criminal Law", where Sir John is revealed in a more critical vein which gives particular scope to the author's facility for illuminating analogy and scholarly quotation, which characterizes the whole book and makes it good reading.

E.

Roman Law in Medieval Europe. By Sir Paul Vinogradoff, D.C.L. 2nd edition by Professor F. de Zulueta, D.C.L. Oxford University Press. 145 pp., with Appendix of texts, and Index. (5*s.*)

In size and form the book is a sketch, but the matter which the late Professor Vinogradoff has brought together in its pages makes it at once an extremely valuable and very attractive history book for the student of Roman Law who could pass beyond the limits of the sixth century A.D. Of its five chapters, "The Decay of Roman Law" deals with the three Barbarian Codes and the sterilization which led to the bulk of Roman legal learning being jettisoned at the moment when Roman Law was brought face to face with vigorous rivals. "The Revival of Jurisprudence" is sketched at the four centres of learning, Provence, Pavia, Ravenna, and Bologna: the work of the Glossators is illustrated from the teaching of Vacarius. "Roman Law in France" covers Ivo of Chartres, the Lo Codi, and de Beaumanoir, with illustrations from the latter of the blending of Custom with Roman influence in Procedure, Prescription and "Seisin", Family Law and Contract. The author is modest and the passages chosen to illustrate the theses are attributed to their respective sources: but one is tempted to wonder how much of "Equity . . . the mere enunciation of a principle of justice, whereas Law propounds the same principle as the expression of a will" is really Irnerius, or of "... gross negligence ... when a person thinks that what is noxious to everyone else is innocuous to him" is really the Lo Codi, and how much the very apt translation of our author. "Roman Law in England" is perhaps over-ready to see traces of Roman influence on all sides, and one is wondering whether one can accept that origin for the distinction between real and personal property, when the author admits that here Bracton and his fellow-judges went a step beyond their Roman guides. "Roman Law in Germany" is taken down to the reception of the sixteenth century once more with illustrations, chiefly from the "consultations" of the jurists (a remarkable reincarnation of the "responsa prudentium"), but also from such manuals as Bartolus' "Trial of Satan". "Satan appears before the tribunal of Christ ... the next day the Virgin Mary appears as an advocate for mankind. ... Mascaron objects ... firstly because she is a woman and ... unfit to be an advocate, and secondly on account of her relationship with the Judge. ... The action is an "actio spolii" for despoiling Hell of its possession. The Virgin demurs on the ground that Hell was only entitled to the detention of mankind. ... Satan then tries to bring a petitory action. ... The Virgin excepts against this: Hell itself was the cause of the Fall and is not entitled to reap the benefit of its own fraud" ..., &c. These illustrations, handled with a dexterity only possible to one of the author's consummate learning, are what really make the book so unusually vivid. The main theme underlying the whole is the clash between the Roman jurisprudence, based on imperial sovereignty, and the Teutonic, summed up as "the principle that a man must be made answerable primarily to his own law". May we find it satisfactory that when the Teutonic conception broke down, as men's political sense developed, Englishmen alone, of the nations of the West, had sufficient native juristic genius to evolve a Common Law of their own, in preference to receiving a system worked out by other people? R. L. H.

Das Wesen des Völkerrechts und Kritik der Völkerrechtsleugner. By Dr. Jur. et Phil. G. A. Walz. *Handbuch des Völkerrechts.* Edited by Stier-Somlo. Kohlhammer. Stuttgart. 1930. 274 pp.

Dr. Walz's contribution to what the editor of this series calls "fundamental concepts of international law" consists mainly in an exposition and critical examination of the doctrines of the "deniers" of international law. Thus, in the first Part of the book he gives an account of the doctrines of Hobbes and Spinoza, the "natural law radicals", of Lasson, Gumplowicz and Seydel, for whom international law is only a system of the politics of force, of Austin and his followers, for whom the law of nations is merely positive morality, and of Fricker, Zitelmann, and others, who regard international law as incomplete and growing law. In the second Part, in Sections entitled Anti-Spinoza, Anti-Hobbes, Anti-Austin, and so on, the author subjects the doctrines of these writers to penetrating criticism. In Part III he discusses the relation of international law to international morality, to international comity and to the world legal order.

Although Dr. Walz goes back as far as Spinoza and Hobbes, it is clear that his main concern is with certain modern doctrines in Germany and Austria, in particular with the monistic tendencies of Kelsen and Verdross and with their theories of the supremacy of international law. Accordingly, those not familiar with recent German legal philosophy will find Dr. Walz's discussion somewhat speculative, and they may also find it difficult to appreciate the polemical and at times acrimonious tone of his criticism in this and in other matters. His knowledge of the non-German literature appears to be superficial and not up-to-date, although it looms large in the foot-notes and bibliographies. The frequent irruptions into the field of politics and the denunciations of the Treaty of Versailles do not do justice to the author or to the character of the work. However, these are minor defects in an otherwise most valuable book, which constitutes a distinct contribution to the theory of international law. Dr. Walz is a scholar of extensive philosophical training and knowledge which he puts to excellent use. His general attitude is clearly stated and is vigorously defended. Dr. Walz does not deny the legal character of international law, but he is of the opinion that the legal structure of the international community is different from that obtaining within the state. To his mind international law is one of co-ordination, as distinguished from the law within the state, which is one of subordination. From the point of view of the philosophy of law this attitude is not without interest, inasmuch as it insists on broadening the conception of law so as to make it include the international society as at present constituted. This attitude we believe to be a mistaken one. However, Dr. Walz puts his case in a learned and suggestive manner, and a study of his book will well repay the time expended. H. L.

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